No. 91-7604-CFX
Status: GRANTED

Title: Jeffery Antoine, Petitioner
v.
Byers & Anderson, Inc., et al.

Docketed:
March 11, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: McKeown,M. Margaret

Counsel for respondent: Solicitor General, Ek,Tyna, Fite,William P.

Entry	Date	Note	Proceedings and Orders
1	Mar 11 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Apr 6 1992		Order extending time to file response to petition until April 27, 1992.
6	Apr 27 1992	X	Brief of respondent Byers & Anderson in response to motion for leave to proceed in forma pauperis filed.
7	Apr 27 1992	X	Brief of respondents Byers & Anderson, Inc., et al.(PRINTED BRIEF) in opposition filed.
5	Apr 30 1992		DISTRIBUTED. May 15, 1992
8	May 7 1992	X	Reply brief of petitioner Jeffery Antoine filed.
10	May 18 1992		REDISTRIBUTED. May 22, 1992
12	May 26 1992		REDISTRIBUTED. May 29, 1992
13	May 27 1992		Record requested.
14	Aug 31 1992		Record filed.
		*	Original Proceedings from USDC, Western District of Washington. (1 box containing 4 volumes)
15	Sep 17 1992		REDISTRIBUTED. October 9, 1992
17	Oct 13 1992		Petition GRANTED.
			**********
18	Nov 23 1992		Joint appendix filed.
19	Nov 23 1992	G	Motion of Jonathan and Karen Scott for leave to file a brief as amici curiae filed.
22	Nov 23 1992		Brief of petitioner Jeffery Antoine filed.
23	Nov 23 1992	G	Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae filed.
20	Dec 7 1992		Motion of Jonathan and Karen Scott for leave to file a brief as amici curiae GRANTED.
21	Dec 7 1992		Record filed.
		*	Original proceedings U. S. District Court, Western District of Washington (Companion Case No. CR85-87JET) (BOX)
29	Dec 7 1992		Opposition of respondent Byers and Anderson to motion of Jonathan and Karen Scott and other amici for leave to file a brief as amici curiae filed.
24	Dec 9 1992		Opposition of Shanna Ruggenberg to motion of Natl. Assn.of Criminal Defense Lawyers and other amici for leave to file a brief as amici curiae filed.
25	Dec 28 1992		Brief amicus curiae of National Court Reporters Association filed.
26	Dec 28 1992		LODGING consisting of one envelope containing eight

No. 91-7604-CFX

Entry	Date	Note	Proceedings and Orders
			documents received from amicus, National Court Reporters Association
27	Dec 30 1992		Brief of respondent Byers & Anderson filed.
28	Dec 30 1992		Brief of respondent Shanna Ruggenberg filed.
30	Jan 11 1993		Motion of National Association of Criminal Defense Lawyers, et al. for leave to file a brief as amici curiae GRANTED.
33	Feb 3 1993	X	Reply brief of petitioner filed.
31	Mar 3 1993		SET FOR ARGUMENT TUESDAY, MARCH 30, 1993. (3RD CASE).
34	Mar 30 1993		ARGUED.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting the decisions of other circuits and granting absolute, rather than qualified, immunity for a court reporter, even for conduct in violation of numerous court orders and statutory duties.

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[09901-6601/SL920290.149]

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jeffery Antoine prays that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the opinion and judgment of that court in Jeffery Antoine v. Byers & Anderson, Inc. and Shanna Ruggenberg.

OPINIONS BELOW

The opinion of the court of appeals is reported at 950 F.2d 1471 and set forth in Appendix A. The order of the district court granting defendants' motion for summary judgment is set forth in Appendix B. The district court's order on rehearing is set forth in Appendix C. A companion case, United States v. Antoine, is reported at 906 F.2d 1379 and set forth in Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1991. The Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

In reaching its decision below, the court of appeals relied in part on the Court Reporter Act, 28 U.S.C. § 753. The pertinent text is set forth in Appendix E.

STATEMENT OF THE CASE

This petition challenges the grant of absolute immunity to a court reporter for gross negligence in failing to produce and deliver a trial transcript in direct violation of her duties under statute and court rule, as well as in direct derogation of numerous express court orders. The

court reporter's blatant disregard of numerous court deadlines and orders resulted in a four-year delay of petitioner Jeffery Antoine's appeal of his criminal conviction and precluded an orderly, proper appeal. Mr. Antoine's efforts to pursue his appeal resulted in a legal Catch-22 in both the criminal and civil systems, in that each in part based its denial of a remedy on the availability of a supposed remedy in the other.

Statement of Facts

During 1986, the United States District Court for the Western District of Washington at Tacoma contracted on an emergency basis with a private court reporting firm, respondent Byers & Anderson, Inc., to provide court reporting services. Under the contract, Byers & Anderson sent one of its court reporters, respondent Shanna Ruggenberg, to serve as the court reporter during Mr. Antoine's two-day criminal jury trial in March 1986.

Mr. Antoine was convicted. He appealed, immediately ordered the transcript of the proceedings from Ms. Ruggenberg and personally paid her $700. The court of appeals ordered the transcript filed by May 29, 1986. Ms. Ruggenberg failed to file the transcript by the deadline and did not request an extension. This initial

failure to meet the filing deadline was followed by more than three years of motions, court orders and hearings directed at obtaining a simple transcript from a two-day trial. The court of appeals set five subsequent filing deadlines. Ms. Ruggenberg repeatedly failed to provide the transcript, request an extension, communicate with counsel, comply with the orders or offer an explanation for her failure.

Ms. Ruggenberg eventually produced a partial transcript. Finally, in July 1988, she stated in an affidavit that she had lost the remaining notes and tapes. In August 1988, the court of appeals ordered the parties to reconstruct the record pursuant to FRAP 10(c). In April 1989, before the reconstruction, Ms. Ruggenberg suddenly discovered additional notes and tapes. Ms. Ruggenberg's counsel delivered them to the district court.

On May 30, 1989, more than three years after Mr. Antoine's criminal trial and his down payment on the transcript, a substitute reporter filed a partially reconstructed substitute transcript. The reconstructed transcript remained defective in that it included no charge to the jury, no transcript of the sentencing, inaudible words or phrases, garbled testimony and insufficient

identification of speakers. The substitute reporter specifically warned she could not "vouch for the completeness or accuracy of the transcript."

Mr. Antoine's criminal appeal was finally argued, after a delay of four years. On July 9, 1990, the Ninth Circuit vacated and partially remanded his criminal conviction to determine whether he was prejudiced by a lack of a total transcript and whether the delay impaired his defense on retrial. The court refused to order an acquittal in part based on the availability of a civil remedy for any due process violation. See United States v. Antoine, 906 F.2d 1379 (9th Cir.), cert. denied, 111 S. Ct. 398 (1990).

Decisions Below

Mr. Antoine filed this action pro se in the district court, claiming federal constitutional violations and state law breach of contract claims. He initially mischaracterized the action as one under 42 U.S.C. § 1983.[1] The court of appeals in the opinion below correctly observed

[1]Just before trial, the district court appointed counsel for Mr. Antoine. Court-appointed counsel corrected the pleading error in an amended complaint, although the motion for leave to file was not granted because the case was dismissed.

that the jurisdictional basis for the original complaint in the district court was federal question jurisdiction under 28 U.S.C. § 1331 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). App. A, 2a. The original mischaracterization did not affect the court's jurisdiction.

The district court granted defendants' motions for summary judgment, finding that because Ms. Ruggenberg's acts and omissions were within her official capacity as a quasi-judicial officer, she was entitled to absolute immunity. The court also found that because the agent, Ms. Ruggenberg, was not liable, the principal, Byers & Anderson, was also free of liability. The court dismissed Mr. Antoine's federal claims and dismissed without prejudice his pendent state law claims.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit held that a court reporter's transcription of the official court record is a part of the judicial function, and therefore insulated by absolute immunity. The court of appeals also held that Ms. Ruggenberg was entitled to absolute immunity for failing to prepare a timely transcript and failing to comply with the Court Reporter Act and

court orders. The court acknowledged the conflict between its holding and that of the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's adoption of an absolute immunity standard for all court reporter functions is at odds with the Court's functional approach to immunity. In recent years the Court has made it quite clear that immunity for public officials is a drastic measure, to be invoked rarely and only after careful scrutiny. Even where officials' challenged acts are extremely important to the function of government, absolute immunity is appropriate only for discretionary functions where there exist overriding considerations of public policy.

The traditional justification for immunity--the protection of independent judicial discretion--is wholly absent here. None of the court reporter's wrongful acts involved decision-making discretion. No evidence suggests that she made any decisions at all; she simply did not act. To the extent she made any "decision," it was to disregard the rules under which she was bound and to blatantly disregard express court orders.

Contrary to traditional justification, the Ninth Circuit's decision below undermines judicial efficiency. The decision permits court reporters to create unwarranted delays in the judicial process and defy their statutory mandate and court orders without responsibility for the consequences.

The record and decisions below are devoid of any overriding public policy considerations. Indeed, providing absolute insulation to a court reporter who acts in direct violation of the law appears at odds with public policy. Although required to do so by the Court, the court of appeals did not find that the challenged function would suffer under threat of litigation. Nor was the there any evidence to support a claim that the challenged conduct was discretionary.

The decision below fails to recognize that qualified, rather than absolute, immunity sufficiently insulates court reporters from unwarranted and vexatious litigation. There is a significant split among the federal circuits on this issue, with the majority holding against absolute immunity. The decision below unreasonably extends the scope of absolute immunity beyond the court reporter's duties.

Whatever arguments may exist for immunizing some aspects of a court reporter's preparation and delivery of trial transcripts, they evaporate when the reporter fails to perform a ministerial function and then blatantly disregards court orders. Acts in derogation of express court orders are not normal "judicial" functions. At most, court reporters are entitled to qualified immunity.

I. THERE IS A CONFLICT AMONG THE CIRCUITS WITH RESPECT TO ABSOLUTE IMMUNITY FOR COURT REPORTERS

The majority of federal circuits that have considered the issue hold that court reporters have qualified, rather than absolute, immunity. The Second, Fifth and Eighth Circuits hold that court reporters are not entitled to absolute immunity. In addition, the Fourth Circuit has indicated in dicta that a court reporter is not entitled to absolute immunity. See McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972). District courts in the Third and Sixth Circuits have also held against absolute immunity. The Seventh and Ninth Circuits hold in favor of absolute immunity.

A. Courts Holding in Favor of Qualified Immunity for Court Reporters

One of the most oft-cited authorities for the denial of absolute immunity to court reporters is the Eighth Circuit's decision in McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974).[2] In McLallen, the court held that absolute immunity does not protect court reporters from a suit for damages for failing to deliver a convicted indigent's transcript within a reasonable time. The Eighth Circuit reaffirmed this qualified immunity holding in two subsequent opinions. Smith v. Tandy, 897 F.2d 355 (8th Cir.), cert. denied, 111 S. Ct. 177 (1990) (court reporter entitled to only qualified immunity from suit arising from alleged omission in criminal defendant's transcript); Holt v. Dunn, 741 F.2d 169 (8th Cir. 1984) (only qualified immunity for court reporters' delay in preparation of criminal defendant's transcript).

Similarly, the Fifth Circuit holds against absolute immunity. In Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978), the court held that court reporters are not entitled to absolute

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[2]In the opinion below, the court of appeals expressly rejected McLallen. App. A, 4a n.4.

immunity for conduct resulting in an inaccurate trial transcript. The same court held in Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981), that a court reporter was protected by only qualified immunity from liability for delays of between nine and twenty-three months of plaintiffs' criminal appeals. The delays resulted from the court reporters' failure to provide requested transcripts. In dicta, the Fourth Circuit also declines to grant a court reporter absolute immunity. See McCray v. Maryland, 456 F.2d at 4.

Courts of the Second Circuit have twice held that court reporters are entitled only to qualified immunity. In Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983), the plaintiff brought a Section 1983 action against a trial judge and court reporter for altering his criminal transcript. The court of appeals upheld the dismissal of the claims on immunity grounds. The court, however, carefully distinguished the judge's absolute immunity and the court reporter's qualified immunity. Id. at 1018-19.

More recently, a district court in the Second Circuit held that court reporters have neither absolute nor qualified immunity for alleged

conduct that resulted in a six-year delay in the plaintiff's criminal appeal. See Mathis v. Bess, 761 F. Supp. 1023 (S.D.N.Y. 1991).

Finally, district courts in the Third and Sixth Circuits have held that a court reporter is not entitled to absolute immunity. See Mourat v. Common Pleas Court, 515 F. Supp. 1074 (E.D. Pa. 1981) (only qualified immunity for an alleged purposefully inaccurate and erroneous transcript); Odom v. Wilson, 517 F. Supp. 474 (S.D. Ohio 1981) (no absolute immunity for court reporters).

B. Circuits Holding in Favor of Absolute Immunity for Court Reporters

Other than the court below, the Seventh Circuit is the only circuit to grant absolute immunity to court reporters.[3] In Scruggs v. Moellering, 870 F.2d 376 (7th Cir.), cert. denied, 493 U.S. 956 (1989), the court held that absolute immunity barred a claim against a court reporter for alleged falsification of the plaintiff's trial transcript. In another case, absolute immunity barred an action arising from two court reporters' alleged participation in a conspiracy to compel

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[3]The Seventh Circuit frequently takes an expansive view of immunity. See Burns v. Reed, 111 S. Ct. 1934 (1991) and Forrester v. White, 484 U.S. 219 (1988) (reversing Seventh Circuit immunity holdings).

the plaintiff to obtain and pay for unneeded and unnecessary transcripts. Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), cert. denied, 494 U.S. 1085 (1990).

II. THE NINTH CIRCUIT'S DECISION AFFECTS AN IMPORTANT QUESTION OF FEDERAL IMMUNITY LAW AND CONFLICTS WITH THE COURT'S IMMUNITY DECISIONS

Absolute immunity is an extreme measure to be invoked sparingly and with great caution, especially without an express constitutional or statutory basis. Forrester v. White, 484 U.S. 219, 223-24 (1988). Absolute immunity "contravenes the basic tenet that individuals be held accountable for their wrongful conduct." Westfall v. Erwin, 484 U.S. 292, 295 (1988). The Court has succinctly stated that "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." Forrester, 484 U.S. at 224.

Under Forrester and subsequent cases, courts must adopt a "functional" approach in deciding all absolute immunity questions. This approach seeks to "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . to evaluate the effect that exposure to particular forms of

liability would likely have on the appropriate exercise of those functions." Forrester, 484 U.S. at 224.

Absolute immunity is designed to facilitate independent and impartial adjudication. Id. at 227. The underlying public interest in cases concerning the immunity of judicial officers is maintaining the independence and efficiency of the judicial process. Bradley v. Fisher, 80 U.S. 335, 347-48 (1872). The independence of the judiciary is threatened where potential liability can be used to intimidate judicial officers and induce them to act in a less than objective fashion. Forrester, 484 U.S. at 223. To avoid the unnecessary extension of absolute immunity, the Court recognizes a category of qualified immunity. Id. at 224.

Together, Forrester and Westfall outline a two-step functional test to determine whether an official is entitled to absolute immunity for particular conduct. First, the challenged conduct must be discretionary. If so, then public policy factors must justify absolute immunity.

A. The Ninth Circuit's Failure to Consider Whether the Challenged Conduct Was Discretionary Conflicts With the Court's Requirements

In its opinion below, the court of appeals misreads Forrester and erroneously disregards the threshold determination of discretion required by Westfall. See Westfall, 484 U.S. at 297. Forrester does not abandon the discretion requirement. Discretion is crucial because absolute judicial immunity protects the independence of the judiciary by preserving impartiality. The threat of liability only impairs the judicial process when it endangers the objective exercise of discretion. No one has suggested a lack of judicial impartiality in the circuits that have rejected absolute immunity for court reporters.

Forrester adopted the functional approach to restrict the availability of absolute immunity by focusing on conduct, rather than on the individual seeking immunity. Forrester holds that even where the challenged conduct is discretionary, absolute immunity will not lie unless additionally justified under the functional approach.

In Forrester, the Court denied a state court judge absolute immunity from liability connected with his decision to demote and discharge a probation officer. Whether the conduct was discretionary was never at issue in Forrester. The judge's decision clearly was discretionary. Rather than abandoning the discretion inquiry, Forrester reinforces it by holding that even where conduct is discretionary, absolute immunity is only available for judicial, as opposed to administrative or legislative, functions. Forrester repeatedly refers to the notion that absolute immunity is designed to protect decision making and discretion. The court of appeals erred in refusing to consider under Forrester whether the court reporter's conduct was discretionary rather than ministerial.

As the Court held in Westfall, absolute immunity for nondiscretionary functions is unsupported by the traditional justifications for immunity. 484 U.S. at 297. Only "decision-making discretion" warrants the protection of absolute immunity. Id. Failure by the court below to consider discretion directly contravenes Westfall and Forrester and their underlying policies.

B. The Ninth Circuit Erred in Holding That Court Transcriptions Are Judicial Acts

Although court transcription is an important part of the judicial process, it is a purely

ministerial act that, unlike adjudication, is neither the product of independent judgment nor requires decision-making discretion. McLallen v. Henderson, 492 F.2d 1298, 1300 (8th Cir. 1974). The process is governed entirely by the Court Reporter Act, 28 U.S.C. § 753(b). The task requires the court reporter only to follow established procedures and guidelines. Cf. Westfall, 484 U.S. at 299 (no absolute immunity for acts that only follow established procedures and guidelines). Absolute immunity is not warranted for court reporting.

C. The Ninth Circuit Erred in Holding That Unjustified Delay in Providing a Complete Transcript Is Protected by Absolute Immunity

Whatever the merits of a rule that the quality of a transcription is entitled to absolute immunity, a like rule immunizing a court reporter's violation of court orders is insupportable. The court of appeals below erroneously held that because the Court Reporter Act, 28 U.S.C. § 753(b), required Ms. Ruggenberg to transcribe and certify the record, failure to do so was within her jurisdiction. This conclusion is illogical. In essence, the court is saying that because one is required by law to

perform an act, one is also absolutely immune for refusing to do so.

None of the reasons for absolute immunity supports extending it to an official who refuses to follow express statutory mandates and court orders. Qualified immunity is available for those officials who act within, rather than without, their authority. No overriding public policy supports absolute immunity in these circumstances.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 11, 1992

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Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Jeffery Antoine appeals the district court's grant of summary judgment in favor of Byers & Anderson, Inc. and Shanna Ruggenberg. Antoine asserted constitutional claims for violation of due process and access to the courts plus state law claims for breach of contract as a result of Ruggenberg's failure to produce a criminal trial transcript. The district court held that Ruggenberg, a delinquent court reporter, was absolutely immune as a quasi-judicial officer. Byers & Anderson, Ruggenberg's "employer," and Ruggenberg cross-appeal from denial of summary judgment on the issue of whether Ruggenberg was an independent contractor or an employee. We affirm.

I

Byers & Anderson, a court reporting firm in Tacoma, Washington, contracted with the United States District Court for the Western District of Washington to provide court reporting services. As required by the contract, Byers & Anderson sent Shanna Ruggenberg, one of its court reporters, to provide reporting services for the district court. Ruggenberg had provided court reporting services through Byers & Anderson for approximately one and one-half years.

Ruggenberg performed full-time court reporting services for the district court from February 1986 to August 1986. While working in the district court, Ruggenberg spent business hours at the courthouse and contacted Byers & Anderson daily by telephone or in person. To satisfy the requests for overnight transcripts, excerpts of cases, verbatim reports of proceedings, and transcript requests, Ruggenberg was required to transcribe at home in the evenings and on weekends. She was unable to satisfy all of the requests and soon found herself with a backlog of work.

Ruggenberg served on March 3 and 4, 1986, as the court reporter during Jeffery Antoine's jury trial for bank robbery. Antoine appealed his conviction for this crime. Immediately following the trial, on March 20, 1986, Antoine ordered the transcript of proceedings from Ruggenberg. He made a payment of seven hundred dollars on the transcription fee because he was not aware that he could have obtained a transcript without cost due to his inability to pay.

The court ordered the transcript filed by May 29, 1986. Ruggenberg did not meet this deadline, and did not request an extension. For the next three years, Antoine attempted to obtain the transcripts through motions, court orders and hearings. The court set five subsequent filing deadlines for the transcript. Ruggenberg failed to provide the complete transcript, communicate with counsel, or comply with the orders of the court.

Ruggenberg did produce fifty-eight pages of transcript, but she was unable to locate the notes and tapes for the remainder of the proceeding. In July 1988, over two years after the initial transcript request, Ruggenberg claimed in an affidavit that she had lost the remaining notes and tapes. Subsequently, however, in April of 1989, additional notes and tapes were discovered. These items were delivered to the district court, and a substitute reporter attempted to reconstruct the record pursuant to Fed.R.App.P. 10(c).[1] The substitute reporter was unable to complete a full transcript of the criminal proceeding because the notes alone were insufficient to produce an adequate transcript. The reconstructed transcript was deficient in that it included no charge to the jury, no transcript of the sentencing, inaudible words or phrases, garbled testimony, and insufficient identification of speakers.

As a result of his delay in obtaining the partial transcript, Antoine's criminal appeal did not proceed to argument until four years after his conviction. In the underlying criminal action, this court vacated his conviction and remanded. We instructed the district court to determine whether Antoine was prejudiced by his lack of a complete transcript, and whether the delay in obtaining his transcript impaired his defense on retrial. *See United States v. Antoine*, 906 F.2d 1379, 1384 (9th Cir.1990), *cert. denied*, — U.S. —, —, 111 S.Ct. 398, 112 L.Ed.2d 407 (1990). The present status of Antoine's criminal case is unknown.

Antoine filed the present action pursuant to 42 U.S.C. § 1983 (1988). The district court granted Byers & Anderson's and Ruggenberg's motions for summary judgment, holding that Ruggenberg's acts were within her official capacity as a quasi-judicial officer. Summary judgment was denied on Byers & Anderson's assertion that Ruggenberg was an independent contractor and not its employee. The court dismissed Antoine's federal claims and dismissed without prejudice his pendent state law claims.

II

[1] A federal agent acting under authority of purely federal law cannot be held liable under Section 1983.[2] *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir.1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984). Because Ruggenberg was a federal, not state, agent, and because Antoine filed his action pursuant to 42 U.S.C. § 1983, we must first determine whether the district court had jurisdiction to adjudicate his claim. Antoine apparently recognized the problem and sought to amend his complaint to set forth the jurisdictional basis as 28 U.S.C. § 1331 (1988), but the claims were dismissed before the amendment became effective. The district court's summary judgment order disposed of the case as if it were a Section 1983 action.

[2] On appeal, Antoine characterizes his suit as a *Bivens* action. *See* 28 U.S.C. § 1331; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We follow *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988), and ignore Antoine's initial mischaracterization. In *Mullis*, the action against federal agents was filed as a Section 1983 action instead of as a federal question case. On appeal, this court ignored Mullis' mischaracterization and found jurisdiction in the district court under 28 U.S.C. § 1331. *Mullis*, 828 F.2d at 1387 n. 7. Because immunity in *Bivens* actions is coextensive with immunities recognized in Section 1983 cases, our decision is unaffected by the jurisdictional basis.[3] *See, e.g. Harlow v. Fitzgerald*, 457 U.S. 800, 818 n. 30, 102 S.Ct. 2727, 2738 n.

1. Fed.R.App.P. 10(c) provides: "*Statement on the Evidence of Proceedings When No Report Was Made or When the Transcript Is Unavailable.* If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

2. 42 U.S.C. § 1983 (1988) provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. No immunity is expressly provided for in an action brought pursuant to Section 1983. However, Section 1983 was not meant to "abolish wholesale all common-law immunities." *Burns v. Reed*, — U.S. —, 111 S.Ct. 1934, 1938, 114 L.Ed.2d 547 (1991) (quotation omitted). Instead, "this section is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 128 (1976)). A similar analysis is applicable to *Bivens* actions.

1392, 1396 (9th Cir.1988). It is not obvious, as the appellants claim, that the officials should have known their actions were unlawful. Depending on which witnesses the jury chose to believe, it could conclude that the search was carried out in a manner which a competent prison official could have believed was reasonable. The district court therefore did not err in denying appellants' motion for jnov.

IV. Inconsistent Verdicts

Nelson and Osborne argue that even if they are not entitled to jnov, their cases should be remanded for a new trial since the jury findings of Fourth Amendment violations and qualified immunity are irreconcilably inconsistent.

[10] A court reviewing a judgment on allegedly inconsistent verdicts must uphold the judgment if it is possible to reconcile the verdicts on any reasonable theory consistent with the evidence. *Ward v. San Jose*, 948 F.2d 1097, 1103–04 (9th Cir.1991); *Omar v. Sea–Land Service*, 813 F.2d 986, 991 (9th Cir.1987). The consistency of the verdicts "must be considered in light of the judge's instructions to the jury." *Toner v. Lederle Laboratories*, 828 F.2d 510, 512 (9th Cir.1987), *cert. denied* 485 U.S. 942, 108 S.Ct. 1122, 99 L.Ed.2d 282 (1988).

[11] The district court instructed the jury that it could find a Fourth Amendment violation if the search was conducted without "reasonable suspicion to justify the search of that plaintiff." Citing *Anderson*, appellants admit that a finding of a lack of cause is "theoretically reconcilable" with qualified immunity, if the officials reasonably but mistakenly thought they had probable cause. But, they counter, in this case the officials had *no* cause, and so could not have reasonably thought the contrary.

The argument here merely repeats appellants' claims that there was not substantial evidence for a finding of qualified immunity. But where inconsistent verdicts are alleged, the test is not whether there was substantial evidence for the jury's conclusion, but whether it is *possible to reconcile* the verdicts. Here, it is. If the jury concluded that the prison officials thought they had sufficient cause to search, but that the officials were mistaken in that belief, it could find both a Fourth Amendment violation and qualified immunity. *See Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039 ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials ... should not be held personally liable.") (citing *Malley v. Briggs*, 475 U.S. 335, 344–45, 106 S.Ct. 1092, 1097–98, 89 L.Ed.2d 271 (1986)).

The district court also instructed the jury that it could find a violation of the Fourth Amendment if the search was conducted in an unreasonable and abusive manner and if the officials acted intentionally or recklessly. We need not reach the question of whether a finding of unreasonable manner of search is consistent with qualified immunity. Since the jury could have found the Fourth Amendment violations on the basis of lack of cause to search, its verdicts are not "irreconcilably inconsistent."

CONCLUSION

Koch's appeal is remanded to the district court to determine whether he filed his appeal in a timely manner. The judgment below is affirmed in all other respects. Each party shall bear its own costs in No. 90-16282. The panel will retain assignment of that case.

AFFIRMED IN PART, REMANDED IN PART.

Jeffery ANTOINE, Plaintiff–Appellant–Cross–Appellee,

v.

BYERS & ANDERSON, INC., Shanna Ruggenberg, Defendants–Appellees–Cross–Appellants.

Nos. 90-35293, 90-35362 and 90-35363.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 11, 1991.

Decided Dec. 13, 1991.

Action was brought against court reporter and court reporting service for failing to provide complete transcript of criminal proceeding, thereby delaying appellate review of the proceeding for over four years. The United States District Court for the Western District of Washington, Robert J. Bryan, J., entered summary judgment for reporter and service, and plaintiff appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) court reporter was entitled to absolute quasi-judicial immunity, and (2) service was entitled to absolute quasi-judicial immunity.

Affirmed.

1. Civil Rights ⇐206

Federal agent acting under authority of purely federal law cannot be held liable under § 1983. 42 U.S.C.A. § 1983.

2. Federal Courts ⇐641

Mischaracterization of *Bivens* suit against court reporter transcribing federal criminal proceeding as civil rights suit would be ignored on appeal and treated instead as federal question case. 42 U.S.C.A. § 1983; 28 U.S.C.A. § 1331.

3. Federal Courts ⇐776

Court of Appeals reviews de novo district court's grant of summary judgment.

4. Courts ⇐57(1)

Court reporters were entitled to protection of absolute quasi-judicial immunity as matter of law.

5. Judges ⇐36

Judicial immunity is not limited to judges and extends to other government officials who play integral part in implementation of judicial function.

6. Judges ⇐36

Government officials who play integral part in implementation of judicial function enjoy derivative immunity, or quasi-judicial immunity, which can be absolute if their conduct relates to core judicial function.

7. Courts ⇐57(1)

Court reporting activities, being part of adjudicatory function, could receive absolute quasi-judicial immunity.

8. Courts ⇐57(1)

Court reporter's failure to comply with Court Reporter Act or court orders requiring her to produce record did not remove her activities from protection afforded by absolute quasi-judicial immunity. 28 U.S.C.A. § 753.

9. Courts ⇐57(1)

Court reporter's acceptance of fee for transcribing criminal proceedings, although not thereafter earned because no full transcript was prepared, was within jurisdiction of court reporter and did not preclude absolute quasi-judicial immunity.

10. Courts ⇐57(1)

Court reporting service, which employed court reporter either as employee or independent contractor, was entitled to absolute quasi-judicial immunity from liability for reporter's failure to prepare transcript of criminal proceeding where reporter herself was entitled to absolute quasi-judicial immunity.

M. Margaret McKeown and Daniel Laster, Perkins Coie, Seattle, Wash., for plaintiff-appellant-cross-appellee.

Tyna Ek, Merrick, Hofstedt & Lindsey, Seattle, Washington; William P. Fite and Karen J. Feyerherm, Betts, Patterson & Mines, Seattle, Wash., for defendants-appellees-cross-appellants.

the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

28 U.S.C. § 753(b).

There can be no doubt that the making of the official record of a court proceeding by a court reporter is part of the judicial function. That process is inextricably intertwined with the adjudication of claims. The official record reflects evidence taken in the case, the arguments and objections of attorneys, and the ruling of the court. The function of the official record is indispensable to the appellate process. Thus, because the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process, these actions are entitled to absolute quasi-judicial immunity. In this regard, *Mullis* and *Stewart* are unaffected by *Forrester*.[4] Ruggenberg, as a court reporter, is therefore entitled to absolute quasi-judicial immunity for actions in the scope of her authority.

C

We must next determine whether Ruggenberg acted within the scope of her authority in failing to produce Antoine's trial transcript. Absolute immunity will not attach to judicial officers when they act "clearly and completely outside the scope of their jurisdiction." *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir.1986) (citation omitted). In *Mullis*, the court determined that quasi-judicial immunity would attach if the acts complained of were "within the general 'subject matter jurisdiction' of the [quasi-judicial officer] ..." *Mullis*, 828 F.2d at 1390 (citation omitted). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir.1986).

[8] The Court Reporter Act requires Ruggenberg to transcribe criminal proceedings. "The reporter ... designated to produce the record *shall* transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court...." 28 U.S.C. § 753(b) (emphasis added). Ruggenberg was not clearly outside of her jurisdiction in failing to complete the transcript. "Whether an act is judicial 'relate[s] to the nature of the act itself....'" *Ashelman*, 793 F.2d at 1075 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978)). Although Ruggenberg failed to comply with the statute or court orders, Antoine has not shown any action that was not within her responsibilities as a court reporter.

Thus, Ruggenberg is entitled to absolute quasi-judicial immunity despite the impact on Antoine's criminal appeal due to her failure to timely prepare the transcript. "Judicial immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Id.* at 1075 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1872)).

[9] Antoine argues that Ruggenberg's acceptance of the seven hundred dollar payment from him constitutes theft that would preclude absolute immunity from attaching. We disagree. The acceptance of a fee for transcribing the proceedings, although not thereafter earned, is within the jurisdiction of a court reporter and does not preclude absolute immunity. *See New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1304 (9th Cir.1989) (malice or corrupt motive insufficient to deprive a judge of absolute immunity; focus on whether the precise act is a normal judicial function).

D

A party aggrieved by the complete failure of the court reporter to discharge her responsibilities does have remedies. A trial transcript may be reconstructed pursuant to Fed.R.App.P. 10(c), and the Court of Appeals has authority to accord whatever relief might be appropriate pursuant to Fed.R.App.P. 11(b). A district court in the first instance has the power to compel the production of a transcript in the event of a simple delinquency. The final remedy would be to vacate a judgment and remand for a new trial because appellate review was not possible. *See United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir.1989); *United States v. Piascik*, 559 F.2d 545, 547 (9th Cir.1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

The district court did not err in its analysis of alternative remedies. Antoine's criminal appeal was remanded for a finding of whether prejudice had occurred. This was an appropriate remedy under the circumstances of the case. Alternative remedies are available to the private litigant "and to those remedies they must, in such cases, resort." *Forrester*, 484 U.S. at 228, 108 S.Ct. at 544 (quotation omitted).

E

[10] Because Ruggenberg is entitled to absolute quasi-judicial immunity, the district court correctly determined that Byers & Anderson is likewise not liable to Antoine. This is so regardless of Ruggenberg's employment relation with Byers & Anderson.

4. We reject the Eighth Circuit's reasoning in *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). In *McLallen*, the duties of a court reporter were held to be ministerial, not discretionary, and thus were not protected by quasi-judicial immunity. *McLallen*, 492 F.2d at 1299–1300. *McLallen*, decided before *Forrester*, fails to consider the judicial function performed by the court reporter, and focuses on the discretion of the actor. We reject this approach and choose instead to focus on the nature of the function performed by the court reporter.

IV

Because we find that Ruggenberg was entitled to absolute quasi-judicial immunity, we need not reach the cross-appeals on the denial of summary judgment.

V

Ruggenberg's actions as a court reporter meet the criteria for the application of the doctrine of absolute quasi-judicial immunity. The function of a court reporter is integral to the efficient operation of the judicial system and, as such, is entitled to derivative judicial immunity. Otherwise, unsuccessful litigants could bring suit against the court reporter in their efforts to redress a perceived wrong. This threat of prospective litigation would hinder the efficient and accurate transcription of judicial proceedings. The district court was correct in holding that Ruggenberg was entitled to absolute quasi-judicial immunity and therefore granting summary judgment.

AFFIRMED.

Marcus S. SMITH, Hildegard U. Smith, Plaintiffs–Appellants,

v.

William MARSHALL, Jr., M.D., Defendant–Appellee.

No. 88–5757.

United States Court of Appeals, Ninth Circuit.

Dec. 18, 1991.

On Remand for the United States Supreme Court.

Before HALL, WIGGINS and THOMPSON, Circuit Judges.

4a

30, 73 L.Ed.2d 396 (1982); *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909–10, 57 L.Ed.2d 895 (1978); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir.1989). We conclude we have jurisdiction to hear this appeal.

III

A

[3] We review de novo the district court's grant of summary judgment. *Price v. Hawaii*, 939 F.2d 702, 706 (9th Cir.1991). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Datagate, Inc. v. Hewlett–Packard Co.*, 941 F.2d 864, 867 (9th Cir.1991). Issues of immunity are reviewed de novo. *Doe v. Atty Gen. of the United States*, 941 F.2d 780, 783 (9th Cir. 1991).

B

[4] Antoine argues that court reporters are not, as a matter of law, entitled to the protection of absolute quasi-judicial immunity. We disagree.

In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), the Supreme Court confirmed the common law principle that judges have absolute immunity for acts committed within their judicial jurisdiction. The Court described the principle as follows:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.
>
> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

Bradley, 80 U.S. (13 Wall.) at 347 (citation omitted).

In elaborating this principle, the Court stated the following with respect to the record of a lawsuit:

> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Id. at 349.

[5, 6] Judicial immunity is not limited to judges. It extends to other government officials who play an integral part in the implementation of the judicial function. Such officials enjoy derivative immunity (quasi-judicial immunity) which can be absolute if their conduct relates to a core judicial function. *See Mullis*, 828 F.2d at 1388–91 (bankruptcy judge, court clerk, and bankruptcy trustee covered by absolute immunity); *Sharma v. Stevas*, 790 F.2d 1486, 1486 (9th Cir.1986) (clerk of the United States Supreme Court has absolute quasi-judicial immunity because the activities are integral to the judicial process); *Stewart v. Minnick*, 409 F.2d 826, 826 (9th Cir.1969) (court reporters are quasi-judicial officers with regard to acts performed in their designated capacities).

With the decision of the Supreme Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), the analysis of what judicial activities are entitled to quasi-judicial immunity was significantly refined. *Forrester* and subsequent cases confirm that a claim of immunity must be analyzed using a "functional" approach. *See, e.g., Burns*, 111 S.Ct. at 1939; *Forrester*, 484 U.S. at 224, 108 S.Ct. at 542–43; *Westfall v. Erwin*, 484 U.S. 292, 296 n. 3, 108 S.Ct. 580, 583 n. 3, 98 L.Ed.2d 619 (1988). "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544 (emphasis added).

In *Forrester*, the Supreme Court limited absolute judicial immunity to actions that are either "judicial or adjudicative." *Id.* at 229, 108 S.Ct. at 545. By contrast, the *administrative* act of a judge in discharging a court employee was held not to be entitled to the protection of absolute immunity because this function was outside the realm of purely judicial activity. *Id.* The Court decided that although employment and other administrative decisions are crucial to the efficient operation of the judicial system, a judge's performance of these tasks does not bring them within the realm of judicial jurisdiction or make them adjudicative. *Id.* at 230, 108 S.Ct. at 545–46. The Court noted that absolute immunity is designed to facilitate independent and impartial adjudication, *id.* at 227, 108 S.Ct. at 544, but is not meant to insulate judicial officials from all liability for their actions, *id.* at 223, 108 S.Ct. at 542.

[7] Ruggenberg can only receive absolute quasi-judicial immunity if her court reporting activities are part of the adjudicatory function. We conclude that they are.

28 U.S.C. § 753 (1988), known as the Court Reporter Act, gives us the answer to this inquiry. It reads, in relevant part, as follows:

> (b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge.... Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.
>
> The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.
>
> The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to

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APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY A. ANTOINE,

Plaintiff,

v.

BYERS & ANDERSON, INC., a Washington corporation; and SHANNA RUGGENBERG,

Defendants.

No. C88-260TB

ORDER 1) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; 2) DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE AMENDED COMPLAINT; and 3) ORDER OF DISMISSAL

THIS MATTER comes before the court on Defendant Ruggenberg's Motion for Summary Judgment of Dismissal; Defendant Byers & Anderson's Motion for Summary Judgment; Plaintiff's Motion For Leave to File Amended Complaint; and Plaintiff's Motion for Leave to File Second Amended Complaint. The court has reviewed the pleadings filed in support of and in opposition to these motions,

the file herein, and heard oral argument of counsel on 2 February 1990.

Under Fed. R. Civ. R. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. T. W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626 (9th Cir. 1987); Celotex Corp. v. Catrett, 477 U.S. 317 (1985). A motion for summary judgment must be granted against a nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The Court must also consider the substantive evidentiary burden that the nonmoving party must meet at trial. T. W. Elec. Service v. Pacific Elec. Contractor, supra at 632.

FACTUAL BACKGROUND

The plaintiff was charged with the offense of bank robbery and a two-day jury trial was held in March, 1986 before U.S. District Judge Jack E. Tanner. Mr. Antoine was convicted, sentenced and incarcerated. He promptly appealed his sentence and conviction. On March 20, 1986, he ordered the transcript of the proceedings from defendant Ruggenberg, and made a deposit of $700.

Thereafter began a series of delays in securing a transcript. On March 4, 1988 the U.S. Court of Appeals for the Ninth Circuit ("9th Circuit") ordered that the transcript was due on April 8,

1988. A partial transcript of 58 pages was filed on June, 1, 1988. Other orders from the 9th Circuit requiring the production of the remaining transcript or an explanation of the delays were ignored by Ms. Ruggenberg. Ultimately, it was learned she had lost her notes of the trial. Ms. Ruggenberg was fined and arrested as part of the 9th Circuit's efforts to obtain this and other transcripts.

On August 29, 1988 the 9th Circuit ordered the parties to reconstruct the record pursuant to Fed. R. App. P. 10(c). Both parties submitted materials, which were filed in January 1989. In April 1989, reporter notes were delivered by Ms. Ruggenberg's counsel to the court and a transcript was produced by another reporter. Mr. Antoine's trial record and transcript has now been certified to the 9th Circuit and a briefing schedule is set for his appeal. Mr. Antoine, in his original complaint, sought specific performance of the contract to produce a transcript of this trial, for which he paid $700, damages for breach of contract, and damages for claimed violations of his constitutional rights to due process and access to the courts pursuant to 42 U.S.C. § 1983.

DISCUSSION

Quasi-judicial immunity is derived from the well-accepted common law doctrine of absolute immunity accorded judges. Imbler v. Pactman, 424 U.S. 409 (1976). The Ninth Circuit has clearly stated that court reporters have quasi-judicial immunity. Stewart

v. Minnick, 409 F.2d 826 (9th Cir. 1969). That court has consistently recognized immunity for quasi-judicial officers when they perform tasks that are an "integral part of the judicial process." Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1390 (9th Cir. 1987) (citing Morrison v. Jones, 607 F.2d 1269, 1273 (9th Cir. 1979), cert. denied, 445 U.S. 962, 100 S. Ct. 1648, 64 L.Ed.2d 237 (1980); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978); Stewart, 409 F.2d 826). In Mullis, the court reasoned that the acts committed by bankruptcy clerks in filing a complaint or petition is a basic and integral part of the judicial process and consequently the clerks qualify for quasi-judicial immunity. 828 F.2d at 1390. In that case, the clerks allegedly failed to carry out their duties. The court concluded that since the acts were within the "'general subject matter jurisdiction' of the bankruptcy clerks" that the clerks had absolute immunity. The court explained that a "mistake or an act in excess of jurisdiction does not abrogate judicial immunity, even if it results in 'grave procedural errors'." Id. (quoting Stump v. Sparkman, 435 U.S. 349, 359, 98 S. Ct. 1099, 1106, 55 L.Ed.2d 331 (1978). The same reasoning would appear to apply to court reporters. See, Stewart, 409 F.2d at 826.

However, a recent U. S. Supreme Court decision draws a clear distinction between administrative and judicial functions as they pertain to the immunity of a judge. Forrester v. White, 484 U.S. 219 (1988). In Forrester, a judge was denied judicial immunity

for the "administrative" act of discharging an employee, even though the Court recognized that such decisions were essential to the very functioning of the courts. The Court was emphatic in its conclusion that it is the nature of the function performed that determines whether judicial immunity attaches. Consequently, the 9th Circuit decisions that hold that even ministerial acts are protected under quasi-judicial immunity may have been overruled by the Forrester decision. See, e.g., Morrison v. Jones, 607 F. 2d 1269 (9th Cir. 1978) (performance of a ministerial duty clothed with quasi-judicial immunity). At least, the Ninth Circuit cases must be examined carefully with Forrester in mind.

Under the pre-Forrester Ninth Circuit analysis, the court reporter would have absolute immunity for two reasons: first, the court reporting function is an integral part of the judicial process; and second, the court reporter, in producing a transcript, was acting within her official capacity as a quasi-judicial officer. Therefore, even though her acts and omissions may, in fact, have been inconsistent with her responsibilities, she is nevertheless absolutely immune from a civil damage suit. See, Mullis, 828 F.2d at 1385.

This result is not altered by the Forrester decision. Although the U.S. Supreme Court made a clear statement that administrative decisions (even when made by a judge) are not protected, the Court did not say that a task, merely because it

can be described as administrative, places it outside the ambit of judicial functions. Obviously, judges perform a number of administrative tasks that are part of the judicial function. Forrester does not limit the doctrine of absolute immunity by excluding any act that could be described as administrative without regard to its relationship to the judicial process. It is the relationship of the act to the judicial function that is crucial under Forrester.

Critical to the Forrester analysis is the question of whether there are adequate remedies available to litigants through ordinary judicial mechanisms. For example, in some situations, where a significant portion of the record is absent, courts have found reversible error. See, United States v. Selva, 559 F.2d 1303 (5th Cir. 1985). In other situations, it is appropriate to vacate a judgment and remand the case for a hearing to determine whether the appellant was prejudiced by the lack of a complete record. See, Brown v. United States, 314 F.2d 293 (9th Cir. 1963); United States v. Piascik, 559 F.2d 545 (9th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). Moreover, the appellate rules provide for relief in situations where a transcript is not produced. Fed. R. App. P. 10(c), 11(b). Under Rule 10(c), the "appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Under Rule 11(b), the Court of Appeals has the authority and discretion to provide whatever relief might be appropriate through the judicial process.

In the situation before the court, unlike the employee fired by the judge in Forrester, appellant has remedies available through the judicial process. Consequently, the act or omission that gives rise to such a judicial remedy is properly described as judicial as opposed to administrative.

Finally, one could argue that granting immunity to a court reporter does not operate to protect the decision-making aspect of the judicial function, but instead protects the ministerial aspects of a court reporter's job. See, e.g., McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974). In McLallen, the court explained that the purpose of quasi-judicial immunity is to protect "non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages." Id. at 1300. The court reasoned that, since court reporters function in a ministerial capacity, they should not be protected by quasi-judicial immunity. However, neither Forrester nor the 9th Circuit have adopted such a narrow view of quasi-judicial immunity.

Defendant Ruggenberg's acts and omissions were within her official capacity as a quasi-judicial officer. Preparing a transcript is clearly part of the court reporter's job responsibilities, is an integral part of the judicial process, and is part of the judicial function. Therefore, even if the record supports the allegations that Ms. Ruggenberg's acts were improper, or even

malicious, it would not abrogate her immunity. See, Mullis, 828 F.2d at 1388 (citing Stump, 435 U.S. at 356-57, 98 S. Ct. 1099, 1104-05). Her acts are absolutely immune from a civil damage suit.

Mr. Antoine has received the relief provided by the judicial process in that the record was reconstructed pursuant to the Federal Rules of Appellate Procedure, and he finally obtained a copy of his trial transcript. His trial record of his criminal case has been certified for appeal and it will be considered in due course by the 9th Circuit. To this extent, he has not been denied due process or access to the courts. Any damage he has suffered as a result of the delay is prospective and speculative and will not become evident until, and unless, his conviction is reversed on appeal.

Finally, the question of whether Byers & Anderson could be held liable, even though Ms. Ruggenberg has immunity, must be answered in the negative. A principal's liability is solely vicarious. Brink v. Martin, 50 Wash.2d 256 (1957) (citations omitted). Thus, because the agent (Defendant Ruggenberg) is not liable, Byers & Anderson, as principal, is also free of liability.

Therefore, for the foregoing reasons, defendants' motion to dismiss should be granted and plaintiff's claims under 42 U.S.C. § 1983 should be dismissed.

The remaining claim in the original complaint (breach of contract) is based on state law. State law claims may be con-

sidered by a federal court on the exercise of pendant jurisdiction over those claims, whenever the federal and state claims "derive from a common nucleus of operative fact." Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) The plaintiff has filed two motions to amend his complaint to add further state law claims. The first motion seeks to add the claims of gross negligence, common law negligence, negligent hiring and breach of contract against both defendants. The second motion seeks to add the claim of violation of the Washington State Consumer Protection Act against both defendants.

The jurisdictional basis for filing the original complaint in federal court was the federal question raised under 42 U.S.C. § 1983. In light of the foregoing opinion that the § 1983 claim should be dismissed, the remaining case consists of only state law claims. Under the analysis of the Gibbs decision and Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), the case properly belongs in state court. Therefore, the court should dismiss the state law claims, with leave to refile in state court before entry of an order of dismissal of the state claims. Plaintiff's motions to amend his complaint should therefore be denied in this court.

Therefore, for the above stated reasons, it is hereby

ORDERED that Defendants Byers & Anderson and Ruggenberg's Motions for Summary Judgment on the issue of quasi-judicial

immunity are **GRANTED** and plaintiff's claim pursuant to 42 U.S.C. § 1983 is hereby **DISMISSED**; and it is further

ORDERED that Plaintiff's state law claim of breach of contract is hereby **DISMISSED WITHOUT PREJUDICE** effective 16 March 1990. Plaintiff may file the pendent claim in state court, and the effective date of this Order is therefore delayed until 16 March 1990 to facilitate such filing; and it is further

ORDERED that plaintiff's motion for leave to file amended complaint and plaintiff's motion for leave to file second amended complaint are **DENIED without prejudice** to filing in a state court; and it is further

ORDERED that the Clerk of the Court shall enter a judgment of dismissal of this case on March 16, 1990.

The Clerk of the Court is instructed to send uncertified copies of this Order to plaintiff at his last known address and to all counsel of record.

DATED this 16th day of February, 1990.

Robert J. Bryan
Robert J. Bryan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY A. ANTOINE,

Plaintiff,

v.

BYERS & ANDERSON, INC., a Washington corporation; and SHANNA RUGGENBERG,

Defendants.

No. C88-260TB

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS MATTER comes before the court on Plaintiff's Motion for Reconsideration pursuant to Fed. R. Civ. P. 59(e) of the court's order entered on February 16, 1990. The court has reviewed the pleadings filed in support of plaintiff's motion. Plaintiff has not presented any new facts, authority, or argument to cause the court to reconsider its previous Order Granting Defendants' Motion for Summary Judgment.

Therefore, for the above-stated reasons, it is hereby ORDERED that Plaintiff's Motion for Reconsideration is DENIED.

The Clerk of the Court is instructed to send uncertified copies of this Order to plaintiff at his last known address and to all counsel of record.

DATED this 5 day of March, 1990.

Robert J. Bryan
United States District Judge

violations of 18 U.S.C. § 3161(c) (Speedy Trial Act) and 28 U.S.C. § 753(b) (Court Reporter Act), as well as auxiliary constitutional violations. He also alleges a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and an infringement of due process as a result of an unreasonable delay in the processing of his appeal. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part and vacate and remand in part.

I

Antoine was indicted on October 23, 1985, and convicted following a two-day jury trial on March 3–4, 1986. On March 12, Antoine's ex-wife, acting on behalf of Antoine, requested a copy of the reporter's transcript, and paid the full amount necessary to secure it. Despite repeated motions filed by Antoine's counsel and repeated orders entered by the district court directing the transcripts to be prepared, no transcripts had been filed and no explanation had been given by the court reporter as of July 11, 1988. On that date, the reporter finally informed the court that she was unable to locate her trial notes and tapes.

On August 9, 1988, our clerk of court directed the district court to prepare a reconstruction of the trial proceedings pursuant to Fed.R.App.P. 10(c); this order was confirmed in our order dated August 29. On February 16, 1989, Antoine's counsel filed a rule 10(c) statement with the district court, but stated that the 10(c) reconstruction of the record was inadequate. The district judge ordered a hearing for April 29, 1989. In the meantime, portions of the reporter's notes were located. From these, a partial transcript was produced by a substitute court reporter and filed on May 31, 1989. Antoine objected, pointing out numerous omissions and garbled testimony, and moved to vacate his conviction. The district court denied this motion on August 11, 1989, and ordered Antoine to proceed under either the partial transcript or the (concededly inadequate) rule 10(c) reconstruction.

II

[1] Antoine first argues that the government failed to bring him to trial within the time required by the Speedy Trial Act. The district court's factual findings concerning the Speedy Trial Act are reviewed for clear error, and questions of law are reviewed de novo. *United States v. Karsseboom*, 881 F.2d 604, 606 (9th Cir. 1989).

[2, 3] Under the Speedy Trial Act, a defendant's trial "must commence within seventy days of the filing of the indictment or the defendant's initial court appearance," whichever is latest. *United States v. Morales*, 875 F.2d 775, 776 (9th Cir.1989) (*Morales*); 18 U.S.C. § 3161(c)(1). Antoine was indicted on October 23, 1985. The day of the indictment is not included in the calculation. *United States v. Van Brandy*, 726 F.2d 548, 550 (9th Cir.), *cert. denied*, 469 U.S. 839, 105 S.Ct. 139, 83 L.Ed.2d 79 (1984). Thus, the 70-day period started on October 24, 1985. Antoine's trial began on March 3, 1986; 130 days later. However, a number of these days are not counted toward the 70-day requirement of section 3161(c)(1).

Delays due to pretrial motions are excluded from the computation of the 70 days. 18 U.S.C. § 3161(h)(1)(F); *Morales*, 875 F.2d at 776–77. Here, twenty-three days of delay are attributable to pretrial motions. Antoine's counsel filed a motion to withdraw prior to the indictment which was heard on October 30, 1985, thus accounting for seven days. Ten days are attributable to Antoine's motions requesting a pretrial psychiatric examination. Another six days' delay resulted from various motions filed on February 26, 1986, and heard on March 3. Thus, the total delay is reduced to 107 days.

Delays resulting from mental competency examinations are also excluded. 18 U.S.C. § 3161(h)(1)(A). In addition, delay resulting from transporting the defendant to and from the competency examination may be excluded, "except that any time consumed in excess of ten days . . . shall be presumed to be unreasonable." 18 U.S.C. § 3161(h)(1)(H). Antoine's mental competency examination occupied 45 days; transportation to the examination took five days and transportation from the examination consumed in excess of ten days. An additional 60 days may therefore be excluded, reducing the delay to 47 days. Thus, Antoine was brought to trial within the period mandated by the Speedy Trial Act.

Antoine also appears to assert that the delay violated his sixth amendment right to a speedy trial. He cites no cases to support his rather oblique contention nor indeed does he provide any reasoning. Even if we decided we should address this issue, we would conclude that his assertion is without merit.

III

[4] Antoine next argues that his rights under the Court Reporter Act have been violated because he has not received a complete verbatim transcript of his trial. For this reason alone, Antoine urges that we should reverse his conviction. The government does not dispute that Antoine received an incomplete transcript.

"Court reporters are required to record proceedings verbatim, 28 U.S.C. § 753(b), but the failure to do so does not require a per se rule of reversal." *United States v. Doyle*, 786 F.2d 1440, 1442 (9th Cir.), *cert. denied*, 479 U.S. 984, 107 S.Ct. 572, 93 L.Ed.2d 576 (1986). "[E]ven assuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice." *United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir.1989) (*Anzalone*); *United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir.1990) (*Carrillo*) (reaffirming *Anzalone*'s requirement that defendant show specific prejudice).

> [W]hen a court reporter has failed to record part of the trial proceedings, "[t]he appropriate procedure is to vacate the judgment and remand for a hearing to determine whether appellant was prejudiced by the error in failing to record the arguments. If the trial court concludes that he was, a new trial may be ordered. If the court concludes that he was not, a new final judgment may be entered."

Anzalone, 886 F.2d at 231–32 (emphasis omitted), *quoting United States v. Piascik*, 559 F.2d 545, 547 (9th Cir.1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

Antoine argues that because his counsel on appeal is not the same as his trial counsel, prejudice should be assumed and outright reversal is required under *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964). We do not read *Hardy* as establishing such a requirement. The Court in *Hardy* stated only that "where counsel on appeal was not counsel at the trial, the requirements placed on him by *Ellis v. United States* [356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958)] . . . will *often* make it seem necessary to him to obtain an entire transcript." *Id.* at 282, 84 S.Ct. at 428 (emphasis added). Thus, the reasoning of *Hardy* indicates only that the substitution of counsel is one significant factor to be considered in determining prejudice. This factor, along with others, may be considered by the district court in the hearing on remand.

We therefore vacate the conviction and remand to the district court to determine whether Antoine can show specific prejudice arising from his lack of a complete transcript. We recognize that our result is inconsistent with a prior ruling of the Fifth Circuit. *See United States v. Selva*, 559 F.2d 1303, 1306 (5th Cir.1977) (requiring automatic reversal where transcript is incomplete and appellant has substitute counsel on appeal). However, because *Selva* is inconsistent with our own precedent which directs a specific prejudice determination on a case-by-case basis, *see Anzalone*, 886 F.2d at 232; *Carrillo*, 902 F.2d at 1410, we do not adopt the *Selva* result.

Antoine once again opaquely alludes to a violation of a constitutional right while asserting his statutory claim. There is no substance to his argument and we reject it. In the next section we do, however, address his due process claim which is not attached to any statutory argument.

The check was dated December 6, 1985, and negotiated on December 23, 1985. There is no evidence of when the check was actually mailed; nor did the Government proffer any evidence as to when Carter received the check. Instead, the Government insisted that Carter had failed to allege facts proving that he received the check before December 8, 1985.

In granting the government's motion, the district court found that "it would have been physically impossible for the Carters to receive the check that would toll the statute of limitations". December 6, 1985, the date of the refund check, apparently was a Friday. December 8, 1985 would therefore have fallen on a Sunday. The court apparently based its statement on the assumption that the check could not have been delivered within one day, or by Saturday, December 7, 1985, and that because there normally is no regular mail delivery on Sundays, the earliest Carter could have received the check was Monday, December 9, 1985.

Because the statute of limitation is an affirmative defense, it was Carter's burden to show that the section 6532(b) limitation period bars the Government's claim. *See* Fed.R.Civ.P. 8(c). Although Carter asserted that defense in both his answer and motion to dismiss, he failed to allege any facts showing that he received the check before December 8, 1985. Instead, he merely raised the erroneous legal argument that the limitation period commenced when the Government mailed the check. The date on which Carter received the check is an essential element of his statute of limitations defense. *See* Fed.R.Civ.P. 8(c). Therefore, because Carter did not make a showing "sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial," *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. at 2552, the district court did not err in granting the Government's motion for summary judgment on the erroneous refund claim.

Carter also contends that even if the burden of proof properly rested on him, the court failed to afford him an adequate opportunity to present evidence to meet this burden. He bases this contention on the court's alleged failure to notify him of the new trial date after the trial was placed on the trailing calendar.

However, the grant or denial of summary judgment is based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of or in opposition to the motion, not on evidence adduced at trial. *See* Fed.R.Civ.P. 56(c). Therefore, Carter's contention that he should have been allowed to present evidence at trial lacks merit.

B. Res Judicata

[4] Finally, Carter contends that the court's failure to notify him of the new trial date on the trailing calendar denied him the opportunity to present evidence that his taxes were abated for the 1980 and 1981 tax years in question.

On April 24, 1985, the United States Tax Court entered an order finding the Carters liable for taxes for the tax years 1980 and 1981. We affirmed that decision in *Carter v. Commissioner*, 784 F.2d 1006 (9th Cir. 1986). Carter is therefore bound by *res judicata* and may not relitigate the issue of his liability for taxes in 1980 and 1981. *See Russell v. Commissioner*, 678 F.2d 782, 785 (9th Cir.1982); *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).[5]

The district court did not err in granting summary judgment for the Government.

AFFIRMED.

5. Carter bases his contention that he has no tax liability for the tax years 1980 and 1981 on Notices of Adjustment showing an abatement of his tax liabilities for those years. As the Government notes, the notices indicate that duplicate assessments of Carter's tax liabilities had been entered on both the master and nonmaster files; only the assessments on the nonmaster file were abated.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jeffery ANTOINE, Defendant-Appellant.

No. 86-3073.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 13, 1990.

Decided July 5, 1990.

Defendant was convicted in the United States District Court for the Western District of Washington, Jack E. Tanner, J., of bank robbery. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) Speedy Trial Act was not violated; (2) remand was required for determination of whether defendant's rights under Court Reporter Act were violated; and (3) remand was required for determination of whether delay in processing appeal violated due process.

Affirmed in part, vacated and remanded in part.

1. **Criminal Law ⇐1139, 1158(1)**

District court's factual findings concerning Speedy Trial Act are reviewed for clear error, and questions of law are reviewed de novo. 18 U.S.C.A. § 3161(c).

2. **Criminal Law ⇐577.8**

Day of indictment is not included in calculating time within which defendant must be brought to trial under Speedy Trial Act. 18 U.S.C.A. § 3161(c).

3. **Criminal Law ⇐577.10(8), 577.11(6)**

Defendant was speedily brought to trial under Speedy Trial Act when delays attributable to defendant's pretrial motions and resulting from mental competency examinations were excluded. 18 U.S.C.A. § 3161(c)(1), (h)(1)(A, F, H).

4. **Criminal Law ⇐643, 1166.13**

Failure to provide defendant with complete transcript of trial did not require automatic reversal, even though defense counsel on appeal was not the same as trial counsel; rather than presuming prejudice, substitution of counsel was merely a significant factor to be considered in determining prejudice, and remand was required for determination of whether there was prejudice. 28 U.S.C.A. § 753(b).

5. **Constitutional Law ⇐271**

Extreme delay in processing appeal may amount to violation of due process but due process claim cannot be used as vehicle to implement specific requirements such as those in Speedy Trial Act. U.S.C.A. Const. Amends. 5, 14; 18 U.S.C.A. § 3161(c).

6. **Constitutional Law ⇐271**

In determining whether delay in processing appeal amounts to violation of due process, court considers length of delay, reason for delay, defendant's assertion of his right, and prejudice to defendant. U.S.C.A. Const.Amends. 5, 14.

7. **Criminal Law ⇐1127, 1181.5(3)**

Although three-year delay in processing defendant's appeal was substantial, significant portion of delay resulted from unwillingness or inability of court reporter to produce transcript of trial, and defendant vigorously asserted his right to transcript both before district court and on appeal, record was insufficient to establish whether defendant was prejudiced, necessitating remand on issue of whether delay violated defendant's due process rights. U.S.C.A. Const.Amends. 5, 14.

David Skeen, Port Townsend, Wash., for defendant-appellant.

Robert G. Chadwell, Asst. U.S. Atty., Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, HALL and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Antoine appeals from his conviction for bank robbery, 18 U.S.C. § 2113(a), alleging

we direct the district court on remand to consider Antoine's motion for a new trial based upon an alleged *Brady* violation.

VI

We vacate Antoine's conviction and remand to the district court. On remand, the district court should consider (1) whether Antoine can show specific prejudice in his Court Reporter Act claim arising from his lack of a complete transcript; (2) whether, under his due process claim, Antoine can demonstrate that in the event of a retrial, his defense will be impaired as a result of the delay; and (3) whether Antoine has s[illegible] a valid claim under *Brady*.

RMED IN PART; VACATED AND REMANDED IN PART.

Clifton REDMAN, Plaintiff-Appellant,

v.

COUNTY OF SAN DIEGO; Capt. Richard Beall; Lt. Robert Witcraft; Sgt. Dan Canfield; Deputy Gene Turner, and Does I through XX, Inclusive, Defendants-Appellees.

No. 87-6139.

United States Court of Appeals, Ninth Circuit.

July 11, 1990.

ORDER

Prior report: (9th Cir.) 896 F.2d 362.

Before GOODWIN, Chief Judge, BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, and RYMER, Circuit Judges.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

UNITED STATES of America, Plaintiff-Appellee,

v.

Laurie Jean LUTTRELL, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

William Dale KEGLEY, aka Bill Kegley, Defendant-Appellant.

Nos. 87-5303, 87-5310.

United States Court of Appeals, Ninth Circuit.

July 12, 1990.

Prior report: (9th Cir.) 889 F.2d 806.

Before GOODWIN, Chief Judge, BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, and RYMER, Circuit Judges.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the

en banc court pursuant to Circuit Rule 35-3.

UNITED STATES of America, Plaintiff-Appellee,

v.

Juan Thomas SUAREZ, Defendant-Appellant.

No. 88-1145.

United States Court of Appeals, Ninth Circuit.

July 25, 1990.

Appeal from the United States District Court for the District of Nevada; Lloyd D. George, District Judge, Presiding.

Before CHAMBERS, CANBY, and NORRIS, Circuit Judges.

SUPPLEMENT TO DISSENTING OPINION OF MAY 16, 1990

CHAMBERS, Circuit Judge, concurring in reversal:

In this case I dissented on May 16, 1990. *U.S. v. Suarez*, 902 F.2d 1466 (9th Cir. 1990). I now change my mind and concur in the result, but on a different ground from the majority.

In my change of mind, I find that I misstated the facts, at least partially.

A closer examination of the record convinces me that the officers of the government felt they had Suarez himself, the keeper of the cache, when they handcuffed him. Maybe they had sufficient facts, but they seem to have failed to prove the point. This leads me to concur in the result.

I thank the parties for calling to our attention, by stipulation, the fact that the scene of the detention was a one-car garage and not a four-car common garage.

Perhaps, in the above, I may have only obscured my point. But here it is again. If the officers had asked Suarez if he was the owner of the van which they had taken away from Gonzales, they would have surely known they were talking to the man they wanted to talk to and whose premises they wanted to search. But, on the record, it might have been possible that the man was a visitor to the premises or even a burglar. I know of no presumption that a man who answers a horn blowing from the outside, without more, is the Lord of the Manor from which he emerges.

I have a hunch that the officers probably asked the man before them if he was Suarez, and that the man before them answered that he was. But the record is bare on this. And, we don't handcuff a man on a hunch and throw him to the ground. Also, I attach some importance to this: The registration slip showed the van to be registered to Juan Suarez at 2815 Stamas Drive, and not 574 Roxella Lane, # C.

I still thoroughly believe most of Suarez's testimony to support his affidavit on the motion to suppress was suspect.* For example, Suarez says in paragraphs 3 and 4 of his affidavit, which is in our record, as follows:

"3. That your affiant did not consent to any search of the premises or any area within said premises located at 574 Roxella Lane, # C, Las Vegas, Nevada, on or about October 7, 1987, by any law enforcement officer;

"4. That your affiant was not advised of his Miranda Rights at any time at the aforementioned premises; that he was read his Miranda Rights for the first time on October 7, 1987, at the office of the Drug Enforcement Agency; that this advisement occurred after your affiant had been transported in custody from the aforementioned premises;"

* Affidavit in Support of Motion to Suppress, filed Nov. 20, 19[illegible] CR-S-282, U.S. District Court for the District of Nevada.

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IV

Antoine argues that the [illegible]ee-year delay in processing his appeal amounts to a violation of due process. He therefore urges that his conviction be reversed on this ground.

[5, 6] Courts have recognized that extreme delay in the processing of an appeal may amount to a violation of due process. *Rheuark v. Shaw*, 628 F.2d 297, 302-03 (5th Cir.1980) (*Rheuark*), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir.) (*Johnson*), *cert. denied*, 469 U.S. 1033, 105 S.Ct. 505, 83 L.Ed.2d 396 (1[illegible] We accept this rule in general. We reje[illegible]he idea, however, that a due process claim can be used as a vehicle to implement specific requirements, such as those in the Speedy Trial Act. Indeed, "not every delay in the appeal of a case, even an inordinate one, violates due process." *Rheuark*, 628 F.2d at 303. The Fifth Circuit has adopted a helpful four-factor test for evaluating such claims: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id.* at 303 n. 8 (adapting the test for pretrial delay announced in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972)); *see also Johnson*, 732 F.2d at 381-82 (adopting *Rheuark* test in a criminal appeal).

[7] Applying these factors here, the leng[illegible] of the delay is three years—a substa[illegible]mount of time. In part the delay ma[illegible] attributable to actions by Antoine's counsel. However, the government does not dispute that a significant portion of the delay—probably at least two years—resulted from the unwillingness or inability of the court reporter to produce the transcript of the trial. Antoine, who requested and paid for a copy of the transcript in a timely manner, cannot be blamed for this delay. We conclude that this second factor also favors Antoine. Further, Antoine vigorously asserted his right to the transcript both before the district court and on appeal.

While the first three factors thus favor Antoine to some extent, evaluation of the fourth factor is more difficult. The Fifth Circuit did not indicate whether its test required the appellant to meet all four prongs, or whether the evaluation entailed a balancing test. *See Rheuark*, 628 F.2d at 303 & n. 8. Nevertheless, we are satisfied that a due process violation cannot be established absent a showing of prejudice to the appellant. Hence, although the first three factors lean towards Antoine, we must also address the fourth.

The Fifth Circuit, again adapting *Barker v. Wingo*, analyzed the prejudice prong by identifying three categories of potential prejudice stemming from a delayed appeal: (1) oppressive incarceration pending appeal, (2) anxiety and concern of the convicted party awaiting the outcome of the appeal, and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial. *Rheuark*, 628 F.2d at 303 n. 8. Although other factors may also be relevant, we believe the Fifth Circuit test is sufficient for this appeal.

We cannot determine factor one. While Antoine has been incarcerated pending appeal, whether this incarceration is unjustified and thus oppressive depends upon the outcome of his appeal on the merits, or subsequent retrial, if any. If his conviction was proper, there has been no oppressive confinement: he has merely been serving his sentence as mandated by law. However, it is impossible to determine on the record before us the lawfulness of Antoine's confinement. Although we reject his Speedy Trial Act claim, the absence of a complete record, or the absence of a reconstructed record that does not specifically prejudice Antoine, would preclude Antoine from discovering whether additional substantive challenges to his conviction can be brought. Determination of prejudice will be made on remand. At this stage of the appeal, however, we cannot determine whether Antoine has suffered from oppressive incarceration.

Antoine has undoubtedly experienced anxiety and concern during the protracted

pendency of this appeal. He has not alleged, however, any particular anxiety suffered here that would distinguish his case from that of any other prisoner awaiting the outcome of an appeal. Thus, we do not conclude that this factor is particularly compelling, although it does weigh slightly in Antoine's favor.

Finally, it is uncertain whether the delay has impaired Antoine's grounds for appeal or may impair his defense in the event of retrial. Again, we do not know whether the delay has impaired his grounds for appeal because at this stage in the proceedings we do not know what all those grounds might be. All we say at this point, not without irony, is that Antoine's appeal on the Speedy Trial Act issue was not impaired by the delay.

The government urges that no impairment in the event of a retrial can be established. In the initial trial, Antoine called no witnesses of his own and offered no evidence; the only defense presentation consisted of recalling one of the government's eyewitnesses to the crime. It is unclear how the passage of time could impair a defense based entirely upon a claim that the government had presented insufficient evidence to carry its burden of proof. Nevertheless, we are reluctant to make this determination as an initial matter. The district judge, who heard the trial, is in a better position to determine the effects of the delay upon a possible retrial. Consequently, we remand to the district court to determine whether the delay has impaired the viability of Antoine's arguments.

As can be seen from this analysis, ruling on the existence of a due process violation presents considerable difficulty. If Antoine has suffered an impairment of his defense in the event of a retrial (a question we leave to the district court), a due process violation may well have occurred. Even if Antoine cannot demonstrate this form of prejudice, he may have suffered unjust confinement if he subsequently brings an appeal and it proves substantively meritorious. Indeed, in such case, a due process violation may have occurred even if Antoine would not be prejudiced in his arguments on appeal or at retrial. As a result, we conclude that it would be premature to rule on the alleged due process violation.

Another factor strongly indicates that a ruling on Antoine's due process claim would be premature. Antoine argues that if a due process violation is found, we should direct the district court to enter a judgment of acquittal. However, ordering an acquittal is not the only or indeed even the usual remedy for a due process violation resulting from the unreasonable delay of an appeal. *See Johnson*, 732 F.2d at 383 (observing that a civil claim under 42 U.S.C. § 1983 or a civil contempt proceeding against parties responsible for the delay could constitute an alternative remedy); *Layne v. Gunter*, 559 F.2d 850, 851 (1st Cir.1977) (where undue delay in state appeals process had resulted in possible denial of due process to petitioner, affirmative relief was inappropriate where state courts had begun processing the appeal), *cert. denied*, 434 U.S. 1038, 98 S.Ct. 776, 54 L.Ed.2d 787 (1978); *Morales Roque v. Puerto Rico*, 558 F.2d 606, 607 (1st Cir. 1976) (when appeal is delayed, release of prisoners being held after conviction for nonbailable offenses is only a last resort). We therefore reject Antoine's request for a direction to the district court.

V

Finally, Antoine argues that the government violated *Brady* by failing to supply him with information regarding a government witness that would have been material to his cross-examination. Antoine filed a motion for a new trial based on the alleged *Brady* violation subsequent to his sentencing. The district court did not rule on this motion. Antoine urges that we treat the district court's failure to rule as a denial of the motion and review the merits of his claim. Because we conclude that it is necessary to remand to the district court for the consideration of other issues, we deem it more appropriate to remand this issue as well. Numerous factual issues surround the *Brady* claim. These issues are best resolved by the district court. Therefore,

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(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augumented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original [1] orthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) the quantity of transcripts prepared;

(2) the fees charged and the fees collected for transcripts;

(3) any expenses incurred by the reporters in connection with transcripts;

(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

(5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States at not less than $3,000 nor more than $7,630 per annum. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

June 25, 1948, c. 646, 62 Stat. 921; Oct. 31, 1951, c. 655, § 46, 65 Stat. 726; June 28, 1955, c. 189, § 3(c), 69 Stat. 176; June 20, 1958, Pub.L. 85-462, § 3(c), 72 Stat. 207; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; July 1, 1960, Pub.L. 86-568, Title I, § 116(c), 74 Stat. 303; Sept. 2, 1965, Pub.L. 89-163, 79 Stat. 619; Sept. 2, 1965, Pub.L. 89-167, 79 Stat. 647.

[1] So in original.

NO. 91-7604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. and SHANNA RUGGENBERG,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Byers & Anderson, Inc. and Shanna Ruggenberg ask that the Court deny petitioner Jeffery Antoine's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

I. RESPONSE TO PETITIONER'S STATEMENT OF THE CASE.

Pursuant to Supreme Court Rule 24.2, the respondents have limited their statement of the case to information necessary to correct inaccuracies or omissions in the statement by the petitioner.

Respondents object to petitioner's characterization of the underlying District Court and Ninth Circuit opinions as having granted "absolute immunity to a court reporter for gross negligence in failing to produce and deliver a trial transcript in direct violation of her duties under statute

and court rule, as well as in direct derogation of numerous express court orders." Petition at 2. Neither the complaint nor the orders in question reference "gross negligence." Moreover, the record considered by the courts below does not contain "numerous express court orders" violated by Shanna Ruggenberg. The record considered by the District Court included only one court order. This was a June 1988 order issued by the Ninth Circuit Court of Appeals. In that order, the Ninth Circuit ordered Shanna Ruggenberg to file the transcript in question, file a motion for extension of time, turn over her notes to her attorney, or submit an affidavit to the Ninth Circuit indicating that she is unable to locate her notes pertaining to the transcript in question. See Appendix A. Shanna Ruggenberg subsequently filed an

affidavit with the Ninth Circuit, indicating that she had filed a partial transcript and that she was unable to locate the remainder of her notes. See Appendix B. Petitioner's attempt to expand the record on reconsideration and appeal was specifically rejected by the Ninth Circuit which granted respondent Byers & Anderson, Inc.'s motion to strike. See Appendix C.

Respondents object to petitioner's assertion that Shanna Ruggenberg's behavior resulted in a four-year delay in petitioner Jeffery Antoine's appeal of his criminal conviction. Petition at 3. The Ninth Circuit found that a delay of approximately two years resulted from the unwillingness or inability of the court reporter to produce a completed transcript. United States v. Antoine, 906 F.2d 1379, 1382 (9th Cir. 1990).

Respondents object to petitioner's statement that Jeffery Antoine was denied a remedy for the delay in receiving a completed transcript in his criminal appeal because of any alleged remedy available to him in the civil system. Petition at 3. Jeffery Antoine was not denied a remedy in his criminal appeal. The Ninth Circuit Court of Appeals vacated Jeffery Antoine's conviction and remanded to the district court to consider whether Antoine could show specific prejudice resulting from his lack of a complete transcript and, in the event of a retrial, whether he could demonstrate that his defense would be impaired as a result of the delay in receiving a completed transcript. United States v. Antoine, 906 F.2d at 1384.

II. RESPONSE TO STATEMENT OF FACTS.

Respondents object to the petitioner's statement that the Western

District of Washington at Tacoma "contracted" on an emergency basis with Byers & Anderson, Inc. to provide court reporting services. Petition at 3. The record below did not contain evidence of a contract. Respondent Byers & Anderson, Inc. specifically denies the existence of a contract, and this issue was not before the courts below.

Respondents object to petitioner's statements indicating that Shanna Ruggenberg failed to meet various court deadlines, request an extension, or communicate with counsel. Petition at 3-4. These statements are not supported by the record considered below.

Respondents object to petitioner Antoine's statement that the Ninth Circuit refused to order that Antoine be acquitted because of the availability of a civil remedy for any due process violation. See Petition at 5. The

Ninth Circuit vacated Antoine's conviction and remanded to the district court to determine whether Antoine could show specific prejudice arising from his lack of a complete transcript, and whether (under his due process claim) Antoine could demonstrate that his defense would be impaired on retrial as a result of the delay in receiving the transcript. United States v. Antoine, 906 F.2d at 1384.

III. SUMMARY OF ARGUMENT.

The Ninth Circuit followed strong precedent within its own jurisdiction when it applied absolute quasi-judicial immunity to Shanna Ruggenberg and Byers & Anderson, Inc. The petitioner argued below that the Ninth Circuit's long-standing application of absolute quasi-judicial immunity to court reporters was somehow overruled by recent Supreme Court decisions. In interpreting these

recent Supreme Court decisions, no appellate court has held that they overrule precedent in jurisdictions which have extended absolute quasi-judicial immunity to court reporters.

The Court in Forrester v. White, 484 U.S. 219 (1988), held that a functional approach should be utilized to determine whether absolute immunity applies. Utilizing this "functional approach," the courts below were required to preliminarily determine whether the function being performed by Shanna Ruggenberg was "judicial" in nature. Next, the courts below were required to balance the ability to hold the court reporter accountable against the ill effect that imposing civil liability would have on the court system and the ability of individual court reporters to exercise their required functions.

The District Court and the Ninth Circuit both agreed that the application of this "functional approach" to the facts in this case mandated application of absolute quasi-judicial immunity to Shanna Ruggenberg and Byers & Anderson, Inc. This analysis was legally correct and followed long-standing precedent within the Ninth Circuit. The respondents ask this Court to deny petitioner Antoine's petition for writ of certiorari.

IV. LEGAL ANALYSIS.

A. THE NINTH CIRCUIT FOLLOWED PRECEDENT IN APPLYING ABSOLUTE QUASI-JUDICIAL IMMUNITY TO COURT REPORTERS.

The Ninth Circuit followed established precedent when it applied absolute quasi-judicial immunity to Shanna Ruggenberg and Byers & Anderson, Inc. In Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969), the plaintiff filed

suit under 42 U.S.C. § 1983 against a court reporter, as well as the State of California and a court clerk, complaining that these defendants had refused to furnish him with a portion of the transcript from his criminal trial. The Ninth Circuit summarily concluded that the acts charged against the court reporter (and court clerk) "were acts performed in their capacity as quasi-judicial officers and they were clothed with judicial immunity . . . ." 409 F.2d at 826. The Ninth Circuit affirmed the District Court's dismissal of claims against the individual defendants.

In holding that absolute quasi-judicial immunity applied to the court reporter and court clerk, the Stewart court cited Peckham v. Scanlon, 241 F.2d 761 (7th Cir. 1957). Stewart v. Minnick, 409 F.2d at 826. Peckham, like Antoine, had been convicted of robbery

and sentenced to prison. He subsequently brought suit against the court reporter at his trial, alleging that the court reporter had "negligently refused to furnish plaintiff with a transcript of the trial proceedings, even though plaintiff offered to compensate her." 241 F.2d at 763. The Seventh Circuit Court of Appeals concluded that the court reporter was immune from Peckham's civil rights claim. 241 F.2d at 763.

Other decisions of the Ninth Circuit and other federal courts of appeals have held that court personnel who function as an integral part of the judicial process, such as court clerks and court reporters, are absolutely immune from civil liability. See Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), cert. denied, 494 U.S. 1085 (1990) (absolute quasi-judicial immunity applied to court reporters);

Mullis v. United States Bankruptcy Court, District of Nevada, 828 F.2d 1385 (9th Cir. 1987) ("court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process"); Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969) (court reporter and court clerk protected from 42 U.S.C. § 1983 claims under doctrine of judicial immunity); Sullivan v. Kelleher, 405 F.2d 486 (1st Cir. 1969) (court clerk immune from civil rights claim, irrespective of allegation he acted maliciously or corruptly). See also Thurston v. Robison, 603 F. Supp. 336 (D. Nev. 1985) (court reporters performing acts in their capacity as quasi-judicial officers are clothed with judicial immunity); Zimmerman v. Spears, 428 F. Supp. 759 (W.D. Tex. 1977) (court clerks

entitled to same immunity as judges when performing their official duties).

B. THE NINTH CIRCUIT'S APPLICATION OF ABSOLUTE QUASI-JUDICIAL IMMUNITY TO COURT REPORTERS IS NOT IN CONFLICT WITH RECENT SUPREME COURT DECISIONS.

1. The Ninth Circuit Decision Does Not Conflict With Westfall or Forrester.

The petitioner claims that the Ninth Circuit's application of absolute quasi-judicial immunity to the respondents conflicts with two 1988 decisions of this Court; Westfall v. Erwin, 484 U.S. 292 (1988), and Forrester v. White, 484 U.S. 219 (1988). This Court's decision in Westfall is inapplicable to the facts in this case, and the Ninth Circuit's ruling below is consistent with Forrester.

a. In Westfall, The Court Analyzed Executive, Not Judicial, Immunity.

The petitioner argues that Westfall v. Erwin, 484 U.S. 292 (1988), requires a court to determine that a defendant was performing a "discretionary function" before the defendant will be afforded immunity. Petition at 15-16. In making this argument, the petitioner confuses the doctrines of executive and judicial immunity. Application of the doctrine of executive immunity requires a threshold determination that the executive official was performing a discretionary function. Westfall v. Erwin, 484 U.S. at 299-300. Application of the doctrine of judicial immunity requires a threshold determination that the defendant in the judicial branch was performing a "judicial" act or function. Forrester v. White, 484 U.S. at 227.

In Westfall v. Erwin, supra, a civilian worker at an Army depot who was exposed to a toxic substance brought suit against federal employees in the executive branch, alleging that he had suffered injuries as a result of the federal employees' negligence in performing official acts within the scope of their employment. The Westfall Court did not purport to overrule pre-existing immunity law. The Westfall Court affirmed the Eleventh Circuit, which held that immunity does not apply to a member of the executive branch unless the federal official was performing a discretionary function and was within the scope of his or her employment. 484 U.S. at 299-300.

The Westfall Court's reiteration and clarification of executive branch immunity is inapplicable to this case. The Ninth Circuit appropriately requires

a federal official to show that he or she was performing a discretionary function before the court will afford immunity to a federal employee in the executive branch. See Saul v. Larsen, 847 F.2d 573 (9th Cir. 1988) (Social Security Administration employees are not protected by absolute immunity unless they were performing discretionary acts and their official function would suffer under the threat of prospective litigation). The Ninth Circuit follows Westfall when analyzing executive branch immunity. The immunity afforded the respondents in the courts below was quasi-judicial immunity, not executive branch immunity.

b. The Ninth Circuit's Decision Is Consistent With Forrester.

In Forrester v. White, 484 U.S. 219 (1988), this Court held that a state court judge was not protected by

absolute judicial immunity from damages under 28 U.S.C. § 1983 for his decision to demote and dismiss a court employee. The Forrester Court held that a "functional approach" should be used in determining whether judicial immunity applies to the facts in a particular case. The Court held that a court should analyze the function of the judicial officer, rather than merely rely upon the title of the officer, in determining whether absolute judicial immunity applies. This functional approach also requires a balancing of the risk of non-accountability against the effect that exposure to civil liability would likely have on the appropriate exercise of the judicial officer's function. Forrester v. White, 484 U.S. at 224.

Petitioner Antoine suggests that the Forrester decision is new law which

overrules long-standing Ninth Circuit precedent. The Forrester Court's refusal to extend judicial immunity to a judge's administrative acts was not novel. The Forrester Court cited its own 1880 decision in Ex Parte Virginia (100 U.S. 339) as authority for its holding. 448 U.S. at 228. The "functional approach" articulated in Forrester is a method of analysis acknowledged by the Supreme Court as "[r]unning through our cases, with fair consistency." 448 U.S. at 224. The process of evaluating a judicial officer's function, and the effect that exposure to civil liability would have on the performance of that function, was consistent with law predating Forrester, under which cases like Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969), and Peckham v. Scanlon, 241 F.2d 761 (7th Cir. 1957), were decided. No

appellate court has held that Forrester overruled precedent in jurisdictions which have extended absolute quasi-judicial immunity to court reporters. Forrester may clarify the requirements for the application of judicial immunity, but Forrester does not purport to reject or overrule pre-existing case law.

In Forrester, the Court asked whether the judge's function in firing a court employee was "judicial" or "administrative" in nature. The Forrester Court held that the judge was acting in his administrative capacity, rather than serving a judicial function, when he demoted and discharged the court employee. 484 U.S. at 229. The Forrester Court did not ask whether the judge's conduct was discretionary or ministerial. Clearly, the decision of whether to demote or fire an employee is

discretionary. The proper test for determining whether judicial immunity attaches is whether the function performed was "judicial" in nature.

The District Court and the Ninth Circuit below correctly found that a court reporter who is reporting and transcribing the record of a trial is performing a judicial function which is an integral part of the judicial process. Supervising the preparation of the record of a trial is the court's responsibility, even though this duty is generally delegated to the court reporter and court clerk. See Dellenbach v. Letsinger, 889 F.2d at 761.

Petitioner Antoine's allegations against the respondents pertain to the recording and transcription of his criminal trial in the United States District Court for the Western District of Washington at Tacoma. The recording

and transcription of a trial in federal court is clearly a judicial function under the "functional analysis" set forth in Forrester v. White, 484 U.S. 219.

2. Public Policy Favors The Application Of Absolute Quasi-Judicial Immunity To Court Reporters.

The Forrester Court explained that determining whether any given function is entitled to absolute judicial immunity requires a balancing of interests. Public policy favors the application of absolute immunity to court reporters to protect them from the threat of suit arising from the performance of their court-related duties. Like the court clerk, the court reporter is necessary to the efficient functioning of the judicial process. In essence, the reporter and clerk are an extension of

the judge. The integral relationship between the functions performed by court reporters and the judicial process has led to recognition that these individuals should be protected by absolute immunity when serving in their official capacity.

Necessarily, immunity may protect some individuals who act with improper motives. See, e.g., New Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1301-02 (9th Cir. 1989) (malice or corrupt motive in the performance of judicial tasks is insufficient to deprive a judge of absolute immunity). In balancing this risk against the benefit of affording court reporters immunity, the Courts below acknowledged that the judicial system has means to hold court reporters accountable and to provide some redress to litigants who

are harmed by a court reporter's failure to produce a transcript. The court may impose sanctions on court reporters (which happened in this case) or remove them from their positions. If a litigant is prejudiced by a court reporter's failure to produce a transcript, the litigant may ask an appellate court to vacate a judgment because of this prejudice (which also happened in this case).

The Ninth Circuit in Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (9th Cir. 1991), and the Seventh Circuit in Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), cert. denied, 494 U.S. 1085 (1990), applied the public policy balancing test required by Forrester and concluded that court reporters should be afforded absolute quasi-judicial immunity when performing their official

functions. The Dellenbach court particularly stressed the danger that disappointed litigants, blocked by the doctrine of absolute judicial immunity from suing a judge directly, will vent their wrath on clerks, court reporters, and other judicial officers. 889 F.2d at 763.

In addition to the threat of vexatious litigation, the court system would be severely disrupted if court reporters were required to defend themselves in civil litigation whenever a trial transcript was not delivered within 30 days as prescribed by statute. In most cases, as was true in this case, the transcript is delayed due to the court reporter's backlog of ordered transcripts. This backlog is dependent upon the number of cases appealed in a particular court and the

adequacy or inadequacy of court reporter staffing. These factors are not within the court reporter's control, and discovery concerning these issues would be necessarily disruptive to the court and the judicial system. Public policy favors the application of absolute quasi-judicial immunity to court reporters.

V. CONCLUSION.

In affirming the District Court's dismissal of the respondents by summary judgment, the Ninth Circuit followed established precedent. Recent Supreme Court decisions did not overrule this long-standing precedent. The Ninth Circuit followed the functional approach set forth by this Court in Forrester v. White, supra. Petitioner Antoine's petition for writ of certiorari to the Ninth Circuit should be denied.

DATED this 22nd day of April, 1992.

Respectfully submitted,

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(1559L3)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 86-3073
Plaintiff/ Appellee,	)	
vs.	)	DC# CR-85-87-JET Western Washington
JEFFERY ANTOINE,	)	(Tacoma)
Defendant/ Appellant.	)	ORDER

Before: SNEED, Circuit Judge

On April 28, 1988, this court ordered Court Reporter Shanna Ruggenberg to file, within 7 days, either the outstanding transcripts for this case or a motion for extension of time. Court Reporter Ruggenberg was also ordered to show cause why she should not be sanctioned for failure to comply with the transcript due date set earlier. To date, Court Reporter Ruggenberg has failed to comply with the order or communicate with this court.

APPENDIX B

NO. 86-3073
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JEFFERY ANTOINE, Defendant-Appellant.	)	DC# CR 85-87-JET Western Washington (Tacoma) AFFIDAVIT OF SHANNA RUGGENBERG

STATE OF WASHINGTON)
) ss.
County of Pierce)

SHANNA RUGGENBERG, being first duly sworn on oath, deposes and says:

That I am unable to locate the notes and tapes for the remaining portion of the transcript of proceedings in this action. I have previously filed with the above court some of the transcripts, which were transcribed from notes and tapes that I did have for this action.

Within 7 days of the date of this order, Ms. Ruggenberg shall either file the transcripts for March 3, 4, and 11, 1986, or shall turn over her notes for those days to her attorney, Randall M. Johnson, and notify this court that she has done so.

If Ms. Ruggenberg cannot locate her notes for those days, she shall submit an affidavit to that effect to this court within 7 days of entry of this order.

If Ms. Ruggenberg fails to comply with this order, sanctions may be imposed without further warning.

The clerk will serve a copy of this order on the court reporter monitor; the district court judge; Court Reporter Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq. at 4041 Ruston Way, Tacoma, WA 98402.

This transcription is approximately 58 pages.

/s/
SHANNA RUGGENBERG

SUBSCRIBED AND SWORN to before me this 11th day of July, 1988.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Tacoma.
My commission expires: 3/9/92.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ANTOINE, Plaintiff/ Appellant, vs. BYERS & ANDERSON, INC., SHANNA RUGGENBERG, Defendants/ Appellees.	)	No. 90-35293 90-35362/63 DC# CV-88-260-RJB ORDER

In response to appellee's motion to strike portions of appellant's brief and exhibits, the parties should be advised that the court will consider the record as it was before the court when it ruled on the motion for summary judgment (no more or no less).

FOR THE COURT,

CATHY A. CATTERSON
CLERK OF COURT

/s/
Gwendolyn Baptiste
Deputy Clerk

No. 91-7604

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONTENTS

I. INTRODUCTION

Jeffery Antoine has filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner Antoine requests the Court to review a decision of the Ninth Circuit that granted absolute immunity to a court reporter, despite her violation of court orders and statutory duties. There is a conflict of authority regarding this issue among the federal circuits regarding this important question of federal law. The majority of circuits considering the issue hold that court reporters have qualified, rather than absolute immunity. Respondents oppose Mr. Antoine's petition, without addressing the conflict among circuits. Petitioner Jeffery Antoine requests that the Court grant his petition.

II. ARGUMENT

A. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO RESOLVE THE SPLIT IN AUTHORITY AMONG THE CIRCUITS

The federal circuits are split on whether court reporters have qualified, rather than absolute immunity. Compare Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983); McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978); McCray v. Maryland,

456 F.2d 1 (4th Cir. 1972) with Antoine v. Byers & Anderson, 950 F.2d 1471 (9th Cir. 1991); Scruggs v. Moellering, 870 F.2d 376 (7th Cir.), cert. denied, 493 U.S. 956 (1989). Granting this petition for certiorari gives the Court an opportunity to address this important question and resolve the split among circuits.

B. THE COURT SHOULD GRANT CERTIORARI TO ACHIEVE NATIONAL UNIFORMITY ON THIS IMPORTANT QUESTION OF FEDERAL LAW

Whether court reporters have qualified, rather than absolute immunity presents an important question of federal law. National uniformity is desirable. Court reporters are federal officials, whose civil liability for misconduct ought to be the same in Seattle as it is in New York. Similarly, litigants who are harmed by a court reporter's misconduct should have the same opportunity for redress, regardless of judicial circuit.

Respondents attempt to construct a parade of horribles if court reporters are not accorded absolute immunity. They cite the threat of vexatious litigation and disruption of the judicial process. This argument erroneously suggests an "all or nothing" approach to immunity--either absolute immunity bars all suits

or the floodgates of litigation will opened. To the contrary, the denial of absolute immunity does not necessarily preclude the availability of qualified immunity for those court reporters who act within their duties. Further, those circuits who have operated for years without absolute immunity have not been brought to a halt by unwarranted litigation. The Court should review this important public policy question.

C. RESPONDENTS' OBJECTIONS ARE MERITLESS AND DO NOT BEAR ON THE ISSUES THAT WOULD PROPERLY BE BEFORE THE COURT IF CERTIORARI IS GRANTED

In opposition, Respondents raise several objections to statements in the petition for certiorari. These objections are erroneous or irrelevant.[1] Petitioner's statements of fact are

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[1]Respondents object to characterizing the court reporter's conduct as grossly negligent. The court reporter's culpability, however, would not be before the Court if certiorari is granted. The question presented involves the propriety of absolute immunity.

Respondents next object to the statement that the court reporter violated numerous court orders. The lower courts noted the violation of multiple court orders. Petition, App. A, 2a, 4a; App. B, 5a.

Respondents' third objection is erroneous. They object to Petitioner's assertion that Ruggenberg's behavior resulted in a four-year delay in Mr. Antoine's appeal of his criminal conviction. This is the precise characterization of the court of appeals. Petition, App. A, 7a.

Respondents' fourth objection, as to whether Byers & Anderson contracted with the district court, is both

taken from the opinions below. The procedural posture in this case is a summary judgment motion brought by Respondents. Issues of fact and related inferences properly were resolved in favor of Petitioner. Petitioner asks the Court to review an important question of federal law, not to make fact findings. The Court may accept for purposes of review the lower courts' statements of fact.

Respondents also attempt to distinguish between the threshold requirements of executive and judicial immunity. The Court has never articulated such a distinction, nor do the cases support one. In any event, this is an argument on

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erroneous and irrelevant. The court of appeals stated that "Byers & Anderson . . . contracted with the United States District Court . . . ." Petition, App. A, 2a. Whether a contract existed is also irrelevant to the issue of absolute immunity.

Respondents next object to Petitioner's statements that Ruggenberg failed to meet court deadlines, request an extension, or communicate with counsel. Again, this reflects the language of the court of appeals. Petition, App. A, 2a.

Finally, Respondents attempt to obscure the court of appeals' failure to grant Mr. Antoine's request for acquittal in the appeal of his criminal conviction. In his criminal appeal, the court directed a remand to determine whether Ruggenberg's misconduct violated Mr. Antoine's due process rights, but refused to order an acquittal if such a violation were found. Petition, App. D, 19a. This holding was based on the availability of alternative remedies, which the court cited as including a civil claim. Id.

the merits which is irrelevant to the decision to grant certiorari.

III. CONCLUSION

There is an unmistakable conflict among the circuits regarding an important question of federal law--whether court reporters should be absolutely shielded from liability, despite their wrongful conduct in violation of express court orders. The issue involves an important question of federal law and national uniformity is desirable. The Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

M. Margaret McKeown by JMT

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May 7, 1992

No. 91-7604

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

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STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn, on oath deposes and says:

That on this day I deposited in the U.S. mail, first class postage prepaid, true and correct copies of Petitioner's Reply to Respondents' Opposition to Petition for Writ of Certiorari to the following:

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Jill McCluskey

SUBSCRIBED AND SWORN to before me this 7th day of May, 1992, by Jill McCluskey.

Notary Public in and for the
State of Washington
Residing at Seattle
My appointment expires 7-1-93

PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1201 THIRD AVENUE, 40TH FLOOR • SEATTLE, WASHINGTON 98101-3099 • (206) 583-8888

May 7, 1992

VIA OVERNIGHT DELIVERY

Clerk of the Court
United States Supreme Court
Supreme Court Building
One First Street, N.E.
Washington, D.C. 20543

Re: Jeffery Antoine v. Byers & Anderson, Inc. and Shanna Ruggenberg
Cause No. 91-7604

Dear Sir or Madam:

We are enclosing an original and one copy of Petitioner Jeffery Antoine's Reply to Respondents' Opposition to Petition for Writ of Certiorari, and Certificate of Service, for filing with the United States Supreme Court. Please conform the set of copies and return them to this office in the enclosed self-addressed, stamped envelope.

Very truly yours,

Jeffrey M. Thomas

JMT:clr
Enclosures
cc: Tyna Lee Ek (with enclosures)
William P. Fite (with enclosures)

[09901-6610/SL921280.104]

No. 91-7604

In The

Supreme Court of the United States

October Term, 1992

JEFFERY ANTOINE,

Petitioner,

vs.

BYERS & ANDERSON, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 11, 1992
Certiorari Granted October 13, 1992

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January 1, 1989 – Answer of Defendant Ruggenberg.

June 6, 1989 – Order Appointing Counsel for Plaintiff.

February 16, 1990 – Order Granting Summary Judgment in Favor of Defendants on Grounds of Absolute Immunity.

March 5, 1990 – Order Denying Motion for Reconsideration.

April 3, 1990 – Plaintiff's Notice of Appeal filed.

December 13, 1991 – Opinion and Judgment of the Court of Appeals for the Ninth Circuit.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
WASHINGTON AT TACOMA

JEFFERY A. ANTOINE, *Petitioner,*

v. No. C88-260TB

BYERS AND ANDERSON, INC., and
SHANNA RUGGENBERG, *Defendants.*

COMPLAINT
Filed July 1, 1988

Now comes Jeffery A. Antoine, pro se, pursuant to 42 U.S.C. 1981, 1983 and 1985, and complains as follows:

1. Jurisdiction founded on the existence of a Federal question and amount in controversy. This action arises under the United States Constitution, Fifth Amendment thereof. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. Venue is proper is the Western District of Washington where both defendants are either incorporated, with its principal place of business found therein, or reside.

BACKGROUND

The United States of America, by and though [sic] its agent, United States District Court for the Western District of Washington, Tacoma, entered into a contract, either express or implied, with Byers and Anderson, Incorporated, herein after referred to as B.A.I., a duly chartered and incorporated entity in Tacoma, Washington, at all times pertinent to this action, to reproduce

transcriptions of evidence and testimony received in open court. This contract was consummated on or before September 20, 1985. Shanna Ruggenberg, an agent and employee of B.A.I. was assigned by B.A.I. to perform duties as a "Court Reporter" in the United States District Court, Tacoma and was so employed on or about March 4, 1986, while working in the courtroom of Honorable Jack Tanner. On March 4, 1986, a jury trial was held with Jeffery A. Antoine, the Plaintiff in this action, as the defendant therein. Subsequently, an order was placed with B.A.I. and Ruggenberg to transcribe her notes in preparation of a direct appeal to the United States Court of Appeals for the Ninth Circuit. Ruggenberg, as agent for B.A.I. and B.A.I. individually, have refused to produce said transcripts. Antoine complains as follows:

COUNT ONE:

3. Plaintiff, Jeffery A. Antoine, was the subject or defendant in a jury trial held on March 4, 1986, at which B.A.I. and Ruggenberg were contracted to supply a reporter to transcribe the proceedings, to which Ruggenberg responded.

4. That subsequently, Plaintiff, both personally and through counsel, ordered and purchased a true and accurate copy of a transcript of this jury trial.

5. That as of this date, no transcript has been provided or prepared.

WHEREFORE, Plaintiff demands judgment against Byers and Anderson, Inc. or Shanna Ruggenberg or against both in the sum of 1,000,000.00 and for such further relief as follows:

1. An Order, directing Defendants to perform and fulfill the terms and conditions of the contract with the United States District Court and/or the Plaintiff, to accurately transcribe, prepare and provide Plaintiff with transcript of the proceeding before the Honorable Jack Tanner on March 4, 1986, involving the Plaintiff.

2. For such further relief deemed just and equitable by this Court.

COUNT TWO:

6. Plaintiff affirms and re-states Count One herein.

7. The Defendants are directly responsible for denying Plaintiff his Constitutional right to due process and access to the courts as a result of Defendants willful and reckless refusal to produce a true and accurate transcript of the trial held on or about March 4, 1986, before the Honorable Jack Tanner in Tacoma, Washington.

8. That Defendants have been repeatedly noticed and served demands by the Plaintiff, his counsel and the United States Court of Appeals for the Ninth Circuit, all without heed or production of transcript.

9. Defendants continue to willfully refuse production to which Plaintiff is duly entitled.

WHEREFORE, Plaintiff demands judgment against Byers and Anderson, Inc. or Shanna Ruggenberg or both in the sum of 2,000,000.00 and for such further relief as follows:

1. An Order directing Defendants to transcribe and produce the transcript of the proceedings held before the Honorable Jack Tanner on or about March 4, 1986, which

involved the Plaintiff in this action, within 21 days of entry of this Order and serve said transcript upon the Plaintiff instanter, by certified mail.

2. For such further relief deemed just and equitable by this Court.

15 May, 1988 /s/ _____
Date Jeffery A. Antoine, Plaintiff
(Jurat Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

ANSWER OF DEFENDANT SHANNA RUGGENBERG

Filed January 5, 1989

COMES NOW the defendant Shanna Ruggenberg, and for answer to the complaint filed on July 1, 1988, dated May 15, 1988, admits, denies, and alleges as follows:

1. For answer to paragraphs 1 and 2, and paragraph entitled "Background," the allegations are denied because there is insufficient knowledge and information to form a belief as to the truth of the matters asserted therein, but it is understood that answering defendant did act as a court reporter in proceedings involving the plaintiff that took place in the U.S. District Court in Tacoma before Judge Jack E. Tanner.

2. For answer to Count One, paragraphs 3, 4, and 5, the allegations are denied because there is insufficient knowledge and information to form a belief at [sic] to the truth of the matters asserted therein.

3. For answer to paragraphs 6, 7, 8, and 9, the allegations are denied because there is insufficient knowledge and information to form a belief as to the truth of the matters asserted therein.

4. Answering defendant denies all other allegations contained in plaintiff's Complaint which are not specifically referred to in this Answer.

FOR FURTHER ANSWER AND AFFIRMATIVE DEFENSE, the defendant Shanna Ruggenberg alleges as follows:

5. That if the plaintiff was damaged as in his Complaint set forth or in any manner whatsoever, the same was proximately caused or contributed to by his own careless and negligent acts and/or risks which he assumed and to which he voluntarily exposed himself.

6. That plaintiff's Complaint fails to state a claim upon which relief can be granted against this answering defendant.

7. Answering defendant reserves the right to assert and add affirmative defenses, additional party defendants, cross claims, and/or counterclaims as additional discovery may warrant.

WHEREFORE, the defendant Shanna Ruggenberg prays for judgment as follows:

1. Dismissing the Complaint of plaintiff with prejudice, without recovery, and with the award to the defendant Ruggenberg of costs and disbursements incurred.

2. For such other and further relief as to the Court may deem just and equitable.

DATED this 5th day of January, 1989.

BETTS, PATTERSON & MINES, P.S.

By _____
William P. Fite
Attorneys for Defendant
Shanna Ruggenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

DECLARATION OF MARY BYERS JONES

Filed April 5, 1989

I, Mary Byers Jones, declare as follows:

1. Jennifer Anderson and I are 50 percent shareholders in the corporation of Byers & Anderson, Inc., and have been since its incorporation in 1984. Byers & Anderson, Inc. is a Tacoma court reporting firm.

2. As is the custom with court reporting firms in the area, Byers & Anderson, Inc. contracts with court reporters to provide court reporting services to parties who contact Byers & Anderson, Inc. These court reporters are considered independent contractors rather than employees. The reporter's compensation is determined by the money collected for the individual reporter's services, minus a commission retained by Byers & Anderson, Inc. Byers & Anderson, Inc. does not withhold federal income tax or Social Security tax from the reporter's compensation, which would be required if the reporter was an employee. Byers & Anderson, Inc. was audited by the Internal Revenue Service in 1986. Following that audit, Byers & Anderson, Inc. was not required to pay employee taxes for the independent reporters (including Shanna Ruggenberg).

3. Since Byers & Anderson, Inc. is a successful business, Jennifer Anderson and I are always looking for skilled new court reporters. When we contacted Bates Vocational School in 1984, Shanna Ruggenberg was highly recommended.

4. On or about July of 1984, Byers & Anderson, Inc. contracted with Shanna Ruggenberg to begin court reporting through Byers & Anderson, Inc. As is the case with all court reporters who begin working through Byers & Anderson, Inc., Shanna Ruggenberg was initially required to complete a six month probationary period during which each of her transcripts were read by Jennifer Anderson or myself for accuracy. Shanna Ruggenberg's work was of high quality, and she successfully completed the six month probationary period. Shanna Ruggenberg had provided court reporting services through Byers & Anderson, Inc. for approximately one and one-half years without incident before she began reporting in Judge Tanner's courtroom in 1986.

5. On or about January of 1986, Byers & Anderson, Inc. was contacted by the federal district court in Tacoma, and was asked to provide a court reporter for Judge Tanner's court on an emergency relief basis. It was unusual for Byers & Anderson, Inc. to receive such a request from the Tacoma federal court. Jennifer Anderson and I presented the option of working for the federal court to the court reporters who worked through Byers & Anderson, Inc. and who are not then too busy. At no time did Jennifer Anderson or I instruct Shanna Ruggenberg to accept the temporary court reporting position in Judge Tanner's court. She was presented with the option and she chose to accept it.

6. Judge Tanner's court personell [sic] requested that Shanna Ruggenberg continue to provide court reporting services to the court longer than we had originally anticipated. Soon, the court ceased contacting Shanna

Ruggenberg through Byers & Anderson, Inc., and began to contact her directly.

7. Byers & Anderson, Inc. did not provide court reporting equipment or a work place for Shanna Ruggenberg. The court had complete control over the nature of her work, her hours, and her working conditions. Any transcript that was ordered from Shanna Ruggenberg, whether she was in court or on deposition, was produced according to her own schedule, on her own computer which she kept at home. Byers & Anderson, Inc. did not even knew when or if court transcripts were being ordered from Shanna Ruggenberg while she was working for the federal district court in 1986.

8. Shanna Ruggenberg formally severed her relationship with Byers & Anderson, Inc. in November of 1986, long before she filed an affidavit in court indicating that she had lost her notes and tapes necessary to complete the trial transcript of *U.S. v. Antoine*. A true and accurate copy of her letter of resignation is attached to this declaration as Exhibit 1.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on April 3, 1989, at Tacoma, Washington.

/s/ Mary Byers Jones
Mary Byers Jones

Exhibit 1

11/10/86

BYERS & ANDERSON, INC.
110 South 9th, Suite 301
Tacoma, Washington 98402

ATTENTION: Jenny Anderson & Mary Byers-Jones.

SUBJECT: Letter of Resignation.

Dear Jenny & Mary,

After serious consideration, I have reached a definite decision to resign from the company, effective November 29, 1986. You will readily understand my decision in view of my backlog and personal financial obligations.

My two-and-a-half years with Byers & Anderson have provided me with a great amount of experience and a stimulating challenge, but at the present time my backlog and past due 1984 and 1985 invoices, which I have requested payment, has created a negative cash flow. I feel that these invoices are seriously past due and should have been taken care of a long time ago.

I enjoy the court reporting field and the people I have met in this field, and I regret very much the necessity of leaving because of extreme personal and financial pressures.

Sincerely,

/s/

Shanna R. Ruggenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

DECLARATION OF JENNIFER L. ANDERSON

Filed May 1, 1989

I, Jennifer L. Anderson, declare as follows:

I am one of the 50 per cent shareholders of Byers & Anderson, Inc., a Tacoma court reporting firm and a defendant in the above-referenced lawsuit.

On or about January of 1986, Byers & Anderson, Inc. was contacted by the federal district court in Tacoma, and was asked to provide a court reporter for Judge Tanner's court on an emergency relief basis. Mary Byers Jones and I presented the option of working for the court to Shanna Ruggenberg, who chose to accept the option.

The financial compensation paid by the court for Ruggenberg's services was not negotiated, but was determined by the court. At the time Shanna Ruggenberg agreed to perform court reporting services for the court, no fees or arrangements for transcripts were negotiated with Byers & Anderson, Inc.

Byers & Anderson, Inc. was not advised that Shanna Ruggenberg was reporting the criminal trial of Mr. Antoine on March 3-4, 1986 and was not notified when Mr. Antoine ordered a transcript. The receipt copy attached as Exhibit 2 to the affidavit of Jeffrey Antoine is not a Byers & Anderson, Inc. receipt and Byers & Anderson, Inc. did not receive any portion of the $700 purportedly paid Shanna Ruggenberg for the Antoine transcript. I had

never heard of Jeffrey Antoine until after Shanna Ruggenberg severed her association with Byers & Anderson, Inc.

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Executed on the 17th day of April, 1989, at Tacoma, Washington.

/s/
Jennifer L. Anderson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

DECLARATION OF COUNSEL RE EXCERPTS FROM RUGGENBERG DEPOSITION (EXHIBIT 1 TO MOTION TO RECONSIDER DENIAL OF DEFENDANT BYERS & ANDERSON, INC.'S MOTION FOR SUMMARY JUDGMENT ON INDEPENDENT CONTRACTOR ISSUE)

Filed May 31, 1989

I, TYNA EK, declare as follows:

I am counsel for Byers & Anderson, Inc. in the above-referenced action, and in a Pierce County Superior Court action entitled *Scott v. Byers & Anderson, Inc., et al.*, Pierce County Cause No. 88-2-09876-5. Shanna Ruggenberg is a co-defendant in the Scott action which stems from the delay in production of a transcript reported by Shanna Ruggenberg in a civil action that was before The Honorable Jack Tanner in U.S. District Court in 1986 while Shanna Ruggenberg was serving as temporary court reporter for that court. The following are true and accurate excerpts from the deposition of Shanna Ruggenberg taken on May 19, 1989 in the *Scott* case.

Q. (By Mr. Burroughs) But in your mind you didn't think whether you were an employee or an independent contractor? Was there a distinction in your mind?

A. I didn't really think about it. I knew I paid my own taxes. I was an independent contractor.

Q. A what?

A. An independent contractor, I guess, working through Byers & Anderson.

Q. That was your understanding?

A. Yes.

* * *

[By Tyna Ek] And when you first started to work through Byers & Anderson, I'm assuming they explained to you the arrangements as far as the percentages and how much money they would take as commission, et cetera?

A. Yes.

Q. And that was at the very onset, correct?

A. Yes.

Q. And didn't they also at that time tell you, in fact, in those words, that you were an independent contractor?

A. I believe that was mentioned.

Q. And they told you you would have to get your own B&O tax number, and all of that?

A. Yes.

* * *

[By Ms. Ek] And were any employee taxes taken out from the money that you received for your work?

A. No.

Q. And all of the equipment you used, whether it was in a deposition or in your court assignments or the hearing, did any of that equipment belong to Byers & Anderson?

A. No.

Q. And that was all your own equipment?

A. Yes.

Q. And you mentioned the Baron computer that you bought. Did you purchase that yourself?

A. Yes.

Q. And before you used computer services, you transcribed how?

A. Typewriter.

Q. And the typewriter was owned by you?

A. Yes.

Q. And that was done in your home?

A. Yes.

Deposition of Shanna Ruggenberg, p. 185, l. 23 – p. 186, l. 7, p. 208, l. 4 – l. 17, p. 209, l. 2 – l. 21.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of May, 1989 at Seattle, Washington.

/s/
Tyna Ek

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK

August 12, 1987

BRUCE RIFKIN
CLERK

308 U.S. COURTHOUSE
SEATTLE, WASHINGTON 98104

Mr. Randall M. Johnson
Anderson, Caraher, Brown & Burns
4041 Ruston Way
Tacoma, Washington 98402

Dear Mr. Johnson:

This letter is in response to your questions of me regarding Shanna Ruggenberg's court reporting services to Judge Tanner.

Pursuant to 28 U.S.C. § 753(g) and Chapter 11, Section G.1. of the *Guide to Judicial Policies and Procedures*, Court Reporters Manual, the District Court contracted on an emergency basis with Byers and Anderson, Inc. These emergency services began February 6, 1986, and ended August 8, 1986. As provided for in emergency situations, normal contractual procedures were dispensed with and no formal contract was executed. Section G.1. is part of Section 28 U.S.C. § 753(g) which allows for a standing contract to exist to cover foreseeable excess court reporting needs. The emergency provision exists to cover circumstances when the standing contract has expired or otherwise does not exist.

The Court's emergency needs were precipitated here by the release of an Official Court Reporter from his employment as a reporter serving Judge Tanner in Tacoma. When this situation arose, the Court adopted the

emergency provisions of Section G.1. There was no standing contract which could otherwise have met this need because no firm had responded when the formal solicitation had been let the year before. On January 8, 1986, the Court again began the formal process of open solicitation for contractual court reporting services in Tacoma.

In this emergency, Byers and Anderson billed the Court directly for its services and was paid directly. As is customary when using a reporting firm, the reporter sent by the firm on any given day becomes the contact for communicating reporting needs for subsequent days. As is also customary, reporting firms and judicial officers express preferences for continuity in service. Despite this desire for continuity, the Court had no authority and exercised no authority to limit which particular reporter from Byers and Anderson provided needed emergency reporting services. Byers and Anderson, for that matter, had no continuing obligation to provide reporting services. As in such contracting situations, supervision of the individual reporter was left to Byers and Anderson and not the United States District Court.

My office also became directly involved with Ms. Ruggenberg upon her expression of interest in the position of Official Court Reporter which was advertised on March 18, 1986. Upon receipt of Ms. Ruggenberg's resume (enclosed), it was discovered that she could not be considered for the position of Official Court Reporter without qualifying by testing for listing on the registry of professional reporters of the National Shorthand Reporters Association or passing an equivalent qualifying

examination. The Court agreed to consider Ms. Ruggenberg's application if she succeeded in passing a recognized State qualifying examination. Ms. Ruggenberg decided to take the next available State test, offered in Idaho on May 3, 1986. Ms. Ruggenberg did not successfully complete this test.

In the meantime, the solicitation process begun in January 1986 materialized into a formal contract with a reporting firm. This contract was executed by the Administrative Office of the U.S. Courts to begin August 11, 1986. As a result, the services of Byers and Anderson, Inc., were no longer required.

As you requested, I have enclosed a copy of the Court's Plan for the Effective Utilization of Court Reporters. In doing so, I hop[illegible] that it will not confuse the fact that Byers and Anderson, Inc., was an emergency contracting firm. Neither they nor Shanna Ruggenberg as their agent became an official substitute reporter or temporary reporter. Ms. Ruggenberg was an employee of an independent contracting court reporting firm.

If I can provide further information bearing on the Court's use of the Byers and Anderson, Inc., court reporting firm, please let me know.

Very truly yours,

Bruce Rifkin, Clerk

Enclosures

cc: Susan Barnes
Assistant United States Attorney
bcc: Jon Leeth w/orders
Judge Tanner w/Johnson's letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

v. No. 86-3073

JEFFERY ANTOINE, *Defendant/Appellant.*

ORDER

Entered June 11, 1988

Before: SNEED, Circuit Judge

On April 28, 1988, this court ordered Court Reporter Shanna Ruggenberg to file, within 7 days, either the outstanding transcripts for this case or a motion for extension of time. Court Reporter Ruggenberg was also ordered to show cause why she should not be sanctioned for failure to comply with the transcript due date set earlier. To date, Court Reporter Ruggenberg has failed to comply with the order or communicate with this court.

Within 7 days of the date of this order, Ms. Ruggenberg shall either file the transcripts for March 3, 4, and 11, 1986, or shall turn over her notes for those days to her attorney, Randall M. Johnson, and notify this court that she has done so.

If Ms. Ruggenberg cannot locate her notes for those days, she shall submit an affidavit to that effect to this court within 7 days of entry of this order.

If Ms. Ruggenberg fails to comply with this order, sanctions may be imposed without further warning.

The clerk will serve a copy of this order on the court reporter monitor; the district court judge; Court Reporter

Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq. at 4041 Ruston Way, Tacoma, WA 98402.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

AFFIDAVIT OF SHANNA RUGGENBERG

STATE OF WASHINGTON)
) ss.
COUNTY OF Pierce)

SHANNA RUGGENBERG, being first duly sworn on oath, deposes and says:

That I am unable to locate the notes and tapes for the remaining portion of the transcript of proceedings in this action. I have previously filed with the above court some of the transcripts, which were transcribed from notes and tapes that I did have for this action. This transcription is approximately 58 pages.

/s/
SHANNA RUGGENBERG

SUBSCRIBED AND SWORN TO before me this 11th day of July, 1988.

/s/Cathy Sala
NOTARY PUBLIC in and for the State of Washington, residing at Tacoma.
My commission expires: 3/9/92.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFERY A. ANTOINE, *Petitioner,*

v. No. C88-260TB

BYERS AND ANDERSON, INC., and
SHANNA RUGGENBERG, *Defendants.*

ORDER (1) GRANTING DEFENDANTS' MOTION FOR JUDGMENT; (2) DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE AMENDED COMPLAINT; AND (3) ORDER OF DISMISSAL

Entered February 16, 1990

THIS MATTER comes before the court on Defendant Ruggenberg's Motion for Summary Judgment of Dismissal; Defendant Byers & Anderson's Motion for Summary Judgment; Plaintiff's Motion For Leave to File Amended Complaint; and Plaintiff's Motion for Leave to File Second Amended Complaint. The court has reviewed the pleadings filed in support of and in opposition to these motions, the file herein, and heard oral argument of counsel on 2 February 1990.

Under Fed. R. Civ. R. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. *T. W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626 (9th Cir. 1987); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1985). A motion for summary judgment must be granted against a nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Court must also consider the substantive evidentiary burden that the nonmoving party must meet at trial. *T. W. Elec. Service v. Pacific Elec. Contractor, supra* at 632.

FACTUAL BACKGROUND

The plaintiff was charged with the offense of bank robbery and a two-day jury trial was held in March, 1986 before U.S. District court Judge Jack E. Tanner. Mr. Antoine was convicted, sentenced and incarcerated. He promptly appealed his sentence and conviction. On March 20, 1986, he ordered the transcript of the proceedings from defendant Ruggenberg, and made a deposit of $700.

Thereafter began a series of delays in securing a transcript. On March 4, 1988 the U.S. Court of Appeals for the Ninth Circuit ("9th Circuit") ordered that the transcript was due on April 8, 1988. A partial transcript of 58 pages was filed on June 1, 1988. Other orders from the 9th Circuit requiring the production of the remaining transcript or an explanation of the delays were ignored by Ms. Ruggenberg. Ultimately, it was learned she had lost her notes of the trial. Ms. Ruggenberg was fined and arrested as part of the 9th Circuit's efforts to obtain this and other transcripts.

On August 29, 1988 the 9th Circuit ordered the parties to reconstruct the record pursuant to Fed. R. App. P. 10(c). Both parties submitted materials, which were filed in January 1989. In April 1989, reporter notes were delivered by Ms. Ruggenberg's counsel to the court and a

transcript was produced by another reporter. Mr. Antoine's trial record and transcript has now been certified to the 9th Circuit and a briefing schedule is set for his appeal. Mr. Antoine, in his original complaint, sought specific performance of the contract to produce a transcript of this trial, for which he paid $700, damages for breach of contract, and damages for claimed violations of his constitutional rights to due process and access to the courts pursuant to 42 U.S.C. § 1983.

DISCUSSION

Quasi-judicial immunity is derived from the well-accepted common law doctrine of absolute immunity accorded judges. *Imbler v. Pactman*, 424 U.S. 409 (1976). The Ninth Circuit has clearly stated that court reporters have quasi-judicial immunity. *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969). That court has consistently recognized immunity for quasi-judicial officers when they perform tasks that are an "integral part of the judicial process." *Mullis v. United States Bankruptcy Ct.*, 828 F.2d 1385, 1390 (9th Cir. 1987) (citing *Morrison v. Jones*, 607 F.2d 1269, 1273 (9th Cir. 1979), *cert. denied*, 445 U.S. 962, 100 S. Ct. 1648, 64 L.Ed.2d 237 (1980); *Ship v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978); *Stewart*, 409 F.2d 826). In *Mullis*, the court reasoned that the acts committed by bankruptcy clerks in filing a complaint or petition is a basic and integral part of the judicial process and consequently the clerks qualify for quasi-judicial immunity. 828 F.2d at 1390. In that case, the clerks allegedly failed to carry out their duties. The court concluded that since the acts were within the " 'general subject matter jurisdiction' of the bankruptcy clerks" that the clerks had absolute immunity. The court explained

that a "mistake or an act in excess of jurisdiction does not abrogate judicial immunity, even if it results in 'grave procedural errors'." *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 359, 98 S. Ct. 1099, 1106, 55 L.Ed.2d 331 (1978). The same reasoning would appear to apply to court reporters. *See, Stewart*, 409 F.2d at 826.

However, a recent U.S. Supreme Court decision draws a clear distinction between administrative and judicial functions as they pertain to the immunity of a judge. *Forrester v. White*, 484 U.S. 219 (1988). In *Forrester*, a judge was denied judicial immunity for the "administrative" act of discharging an employee, even though the Court recognized that such decisions were essential to the very functioning of the courts. The Court was emphatic in its conclusion that it is the nature of the function performed that determines whether judicial immunity attaches. Consequently, the 9th Circuit decisions that hold that even ministerial acts are protected under quasi-judicial immunity may have been overruled by the *Forrester* decision. *See, e g., Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1978) (performance of a ministerial duty clothed with quasi-judicial immunity). At least, the Ninth Circuit cases must be examined carefully with *Forrester* in mind.

Under the pre-*Forrester* Ninth Circuit analysis, the court reporter would have absolute immunity for two reasons: first, the court reporting function is an integral part of the judicial process; and second, the court reporter, in producing a transcript, was acting within her official capacity as a quasi-judicial officer. Therefore, even though her acts and omissions may, in fact, have been inconsistent with her responsibilities, she is nevertheless

absolutely immune from a civil damage suit. *See, Mullis*, 828 F.2d at 1385.

This result is not altered by the *Forester* decision. Although the U.S. Supreme Court made a clear statement that administrative decisions (even when made by a judge) are not protected, the Court did not say that a task, merely because it can be described as administrative, places it outside the ambit of judicial functions. Obviously, judges perform a number of administrative tasks that are part of the judicial function. *Forrester* does not limit the doctrine of absolute immunity by excluding any act that could be described as administrative without regard to its relationship to the judicial process. It is the relationship of the act to the judicial function that is crucial under *Forrester*.

Critical to the *Forrester* analysis is the question of whether there are adequate remedies available to litigants through ordinary judicial mechanisms. For example, in some situations, where a significant portion of the record is absent, courts have found reversible error. *See, United States v. Selva*, 559 F.2d 1303 (5th Cir. 1985). In other situations, it is appropriate to vacate a judgment and remand the case for a hearing to determine whether the appellant was prejudiced by the lack of a complete record. *See, Brown v. United States*, 314 F.2d 293 (9th Cir. 1963); *United States v. Piascik*, 559 F.2d 545 (9th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). Moreover, the appellate rules provide for relief in situations where a transcript is not produced. Fed. R. App. P. 10(c), 11(b). Under Rule 10(c), the "appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Under Rule 11(b),

the Court of Appeals has the authority and discretion to provide whatever relief might be appropriate through the judicial process. In the situation before the court, unlike the employee fired by the judge in *Forrester*, appellant has remedies available through the judicial process. Consequently, the act or omission that gives rise to such a judicial remedy is properly described as judicial as opposed to administrative.

Finally, one could argue that granting immunity to a court reporter does not operate to protect the decision-making aspect of the judicial function, but instead protects the ministerial aspects of a court reporter's job. *See, e.g., McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). In *McLallen*, the court explained that the purpose of quasi-judicial immunity is to protect "non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages." *Id.* at 1300. The court reasoned that, since court reporters function in a ministerial capacity, they should not be protected by quasi-judicial immunity. However, neither *Forrester* nor the 9th Circuit have adopted such a narrow view of quasi-judicial immunity.

Defendant Ruggenberg's acts and omissions were within her official capacity as a quasi-judicial officer. Preparing a transcript is clearly part of the court reporter's job responsibilities, is an integral part of the judicial process, and is part of the judicial function. Therefore, even if the record supports the allegations that Ms. Ruggenberg's acts were improper, or even malicious, it would not abrogate her immunity. *See, Mullis*, 828 F.2d at 1388 (citing *Stump*, 435 U.S. at 356-57, 98 S. Ct. 1099, 1104-05). Her Acts are absolutely immune from a civil damage suit.

Mr. Antoine has received the relief provided by the judicial process in that the record was reconstructed pursuant to the Federal Rules of Appellate Procedure, and he finally obtained a copy of his trial transcript. His trial record of his criminal case has been certified for appeal and it will be considered in due course by the 9th Circuit. To this extent, he has not been denied due process or access to the courts. Any damage he has suffered as a result of the delay is prospective and speculative and will not become evident until, and unless, his conviction is reversed on appeal.

Finally, the question of whether Byers & Anderson could be held liable, even though Ms. Ruggenberg has immunity, must be answered in the negative. A principal's liability is solely vicarious. *Brink v. Martin*, 50 Wn.2d 256 (1957) (citations omitted). Thus, because the agent (Defendant Ruggenberg) is not liable, Byers & Anderson, as principal, is also free of liability.

Therefore, for the foregoing reasons, defendants' motion to dismiss should be granted and plaintiff's claims under 42 U.S.C. § 1983 should be dismissed.

The remaining claim in the original complaint (breach of contract) is based on state law. State law claims may be considered by a federal court on the exercise of pendant jurisdiction over those claims, whenever the federal and state claims "derive from a common nucleus of operative fact." *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The plaintiff has filed two motions to amend his complaint to add further state law claims. The first

motion seeks to add the claims of gross negligence, common law negligence, negligent hiring and breach of contract against both defendants. The second motion seeks to add the claim of violation of the Washington State Consumer Protection Act against both defendants.

The jurisdictional basis for filing the original complaint in federal court was the federal question raised under 42 U.S.C. § 1983. In light of the foregoing opinion that the § 1983 claim should be dismissed, the remaining case consists of only state law claims. Under the analysis of the *Gibbs* decision and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the case properly belongs in state court. Therefore, the court should dismiss the state law claims, with leave to refile in state court before entry of an order of dismissal of the state claims. Plaintiff's motions to amend his complaint should therefore be denied in this court.

Therefore, for the above stated reasons, it is hereby

ORDERED that Defendants Byers & Anderson and Ruggenberg's Motions for Summary Judgment on the issue of quasi-judicial immunity are GRANTED and plaintiff's claim pursuant to 42 U.S.C. § 1983 is hereby DISMISSED; and it is further

ORDERED that plaintiff's state law claim of breach of contract is hereby DISMISSED WITHOUT PREJUDICE effective 16 March 1990. Plaintiff may file the pendent claim in state court, and the effective date of this Order is therefore delayed until 16 March 1990 to facilitate such filing; and it is further

ORDERED that plaintiff's motion for leave to file amended complaint and plaintiff's motion for leave to file second amended complaint are DENIED without prejudice to filing in a state court; and it is further

ORDERED that the Clerk of the Court shall enter a judgment of dismissal of this case on March 16, 1990.

The Clerk of the Court is instructed to send uncertified copies of this Order to plaintiff at his last known address and to all counsel of record.

DATED this 16th day of February, 1990.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. _____

U.S. District Court Case No. CR85-87T

Short Case Title USA vs. ANTOINE

Date Notice of Appeals Filed by
Clerk of District Court April 18, 1986

SECTION A -
To be completed by party ordering transcript
HEARING DATE: 3/4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Voir Dire

* * *

(attach additional page for designations if necessary)

( ) I do not intend to designate any portion of the trascript and will notify all counsel of this intention.

( ) As retained counsel (or litigent proceeding in pro per), I request a copy of the transcript and guarantee payment to the reporter of the cost thereof upon demand. I further agree to pay for work done prior to cancellation of this order.

(X) As appointed counsel I certify that an appropriate order authorizing preparation of the transcript at the expense of the United Stats has been, or within 5 days hereof will be, obtained and delivered to the reporter. I agree to recommend payment for work done prior to cancellation of this order.

Date transcript ordered May 1, 1986

Estimated date of completion of transcript _____

Signature of Attorney _____

Phone Number (206) 851-2323

Address: 7512 Stanich Court, Gig Harbor, Washington 98335

This form is divided into five parts. It should be used to comply with the Federal Rules of Appellate Procedure and the Local Rules of the U.S. Court of Appeals for the Ninth Circuit regarding the designation and ordering of court reporters' transcripts.

Please note the specific instructions below. If there are further questions, contact the Clerk's Office, U.S. Court of Appeals for the Ninth Circuit at (415) 556-8011

SPECIFIC INSTRUCTIONS FOR ATTORNEYS

(1) Pick up form from district court clerk's office when filing the notice of appeal.

(2) Complete Section A, place additional designations on blank paper if needed.

(3) Send Copy 1 to District Court.

(4) Send Copy 4 to opposing counsel. Make additional photocopies if necessary.

(5) Send Copies 2 and 3 to court reporter. Contact court reporter to make further arrangements for payment.

(6) Continue to monitor progress of transcript preparation.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. _____

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HEARING DATE: 3/3/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Opening Statements

HEARING DATE: 3/3-4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Settlement Instructions

HEARING DATE: 3/4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Closing Arguments

HEARING DATE: 3/4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Jury Instructions

COURT REPORTER: See attached sheet
PROCEEDINGS: Pre-Trial Proceedings

COURT REPORTER: See attached sheet
PROCEEDINGS: Other (please specify)

(attach additional page for designations if necessary)

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(X) As appointed counsel I certify that an appropriate order authorizing preparation of the transcript at the expense of the United States has been, or within 5 days hereof will be, obtained and delivered to the reporter. I agree to recommend payment for work done prior to cancellation of this order.

Date transcript ordered December 24, 1987 and March 1, 1988

Estimated date of completion of transcript
UNKNOWN

Signature of Attorney _____

Phone Number (206) 385-1544

Address: 1535 Jefferson Street, Port Townsend, Washington 98366

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. _____

U.S. District Court Case No. CR85-87T

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COURT REPORTER: See attached sheet
PROCEEDINGS: Pre-Trial Proceedings

COURT REPORTER: See attached sheet
PROCEEDINGS: Other (please specify)

(attach additional page for designations if necessary)

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Date transcript ordered December 24, 1987 and March 1, 1988

Estimated date of completion of transcript
UNKNOWN

Signature of Attorney _____

Phone Number (206) 385-1544

Address: 1535 Jefferson Street, Port Townsend, Washington 98366

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

v. No. 86-3073

JEFFERY ANTOINE, *Defendant/Appellant.*

ORDER
Entered April 28, 1988

The reporter's transcripts for this case were due April 4, 1988. The district court informs this court that transcripts for March 3, and April 11, 1986, are still outstanding. Within 7 days of entry of this order, court reporter Shanna Ruggenberg will either (1) file the transcripts, or (2) submit a motion for extension of time, and shall show cause why she should not be sanctioned for failure to comply with this court's March 4, 1988 order.

This order does not waive the mandatory fee reduction for any portion of the transcripts delivered late. *See* Report of the Proceedings of the Judicial Conference of the United States, March 1982, page 10.

A copy of this order will be served on the court reporter monitor; the district court judge; Court Reporter Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq., at 4041 Ruston Way, Tacoma, WA 98402.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Miriam Mueller
Miriam L. Mueller
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

ORDER

Entered June 14, 1988

Before: SNEED, Circuit Judge

On April 28, 1988, this court ordered Court Reporter Shanna Ruggenberg to file, within 7 days, either the outstanding transcripts for this case or a motion for extension of time. Court Reporter Ruggenberg was also ordered to show cause why she should not be sanctioned for failure to comply with the transcript due date set earlier. To date, Court Reporter Ruggenberg has failed to comply with the order or communicate with this court.

Within 7 days of the date of this order, Ms. Ruggenberg shall either file the transcripts for March 3, 4, and 11, 1986, or shall turn over her notes for those days to her attorney, Randall M. Johnson, and notify this court that she has done so.

If Ms. Ruggenberg cannot locate her notes for those days, she shall submit an affidavit to that effect to this court within 7 days of entry of this order.

If Ms. Ruggenberg fails to comply with this order, sanctions may be imposed without further warning.

The clerk will serve a copy of this order on the court reporter monitor; the district court judge; Court Reporter Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq. at 4041 Ruston Way, Tacoma, WA 98402.

LARSEN, SMITH & ASSOCIATES

COURT REPORTERS

May 30, 1989

Office of Clerk
United States District Court
ATTN: Shirley
308 U.S. Courthouse
Seattle, WA 98104

Re: U.S.A. v. Jeffrey Antoine, CR 85-87T

Dear Shirley:

Enclosed is the original of the above trial transcript. I am sending copies to David Skeen and Gene Wilson with copies of this letter. I am keeping the transcript stored in our computer system in case there are corrections or additions to be made by agreement of counsel.

In order to produce the transcript, I rewrote it for our computer by listening to the audio tapes while watching Shanna's stenotype notes. I indicate at the left margin "(Audio tape on.)" where the tape starts and "(Audio tape off.)" where it was turned off. If the tape was inaudible and there was no help in the notes, I indicated, "(inaudible)." Where there was no tape and I could not read the notes, I indicated, "(unreadable)."

I am aware that in places where I have had to rely on just the written notes that the transcript does not make sense and the speakers are not properly identified. I felt the best I could do would be to give you what was there and hope you could fill in the blanks.

I am also returning to you today the notes and tapes of this trial. Please notify me by September 30 if there are to

be any corrections or additions so that we can clear our computer.

Very truly yours,

Karen L. Larsen, RPR

Encl
cc: David E. Wilson
David Skeen

Karen L. Larsen, RPR • Sharon M. Smith, RPR
Michelle E. Sexton, RPR • Robbie K. McCartney, RPR
Keri A. Aspelund, RPR
Peggy Prichard,RPR, CM Peggy M. Pritschy
Dolores A. Rawlins, RPR
Kathleen J. Cassity, RPR, CM

1800 SEATTLE TOWER • SEATTLE, WASHINGTON
98101 • TELEPHONE (206) 623-6717

LARSEN, SMITH & ASSOCIATES

COURT REPORTERS

July 11, 1989

Mr. David Skeen
Attorney at Law
1535 Jefferson Street
Pt. Townsend, WA 98368

Re: U.S.A. v. Antoine

Dear Mr. Skeen:

At your request I am enclosing two ASCII disks of the above trial transcript.

The letter sent to you with the transcript copy is the best explanation I can give you of the way the transcript was produced. Shanna's notes from the trial were not adequate by themselves to produce a complete transcript, and where she was not using a tape recorder I cannot vouch for the completeness of accuracy of the transcript or speaker identification.

Where I had cassette tapes to work with, I feel the transcript is quite complete. Any inaudibles appearing are indicating whatever is missing is very short. Sometimes Shanna was able to keep up in her writing very well and sometimes she wasn't, so there is no way to tell, since I was not present at the trial, how much she was actually missing when there is no cassette tape.

I transcribed everything I was given of Shanna's notes and tapes for March 3 and 4, 1986. If you have further questions, please call.

Very truly yours,

Karen L. Larsen, RPR

cc: David E. Wilson
Clerk of Court

Karen L. Larsen, RPR • Sharon M. Smith, RPR
Michelle E. Sexton, RPR • Robbie K. McCartney, RPR
Keri A. Aspelund, RPR
Peggy Prichard,RPR, CM Peggy M. Pritschy
Dolores A. Rawlins, RPR
Kathleen J. Cassity, RPR, CM

1800 SEATTLE TOWER • SEATTLE, WASHINGTON
98101 • TELEPHONE (206) 623-6717

IN THE DISTRICT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, *Plaintiff,*

v. No. C85-87T

JEFFREY ANTOINE, *Defendant.*

FINDINGS OF FACT AND ORDER
Entered August 21, 1991

This case is before the Court on remand from the United States Circuit Court of Appeals, 906 F.2d 1379 (9th Cir. 1990). Hearings were held on July 29, 1991 to address three issues:

1. Whether the defendant can show "specific prejudice" from the lack of a complete transcript of his trial?

2. Whether the delay in receiving the trial transcript resulted in a "due process" violation?

3. Whether a "Brady" violation occurred when the statement of Clifton Thomas incriminating both the defendant and Geoffrey Terry, a trial witness, was not provided prior to sentencing?

SPECIFIC PREJUDICE

The Circuit Court set aside the defendant's conviction and remanded the case to this Court to give the defendant an opportunity to demonstrate that he was prejudiced in pursuing his appeal by the lack of a verbatim transcript. Counsel for the defendant presented the

same argument before this court as he did before the appellate court. In essence he repeated his argument for a per se rule of reversal in a situation where there is a violation of the Court Reporter Act and counsel on appeal is different from trial counsel.

This argument has already been rejected by the Circuit Court and the defendant has made no additional showing of prejudice. Therefore, the Court finds that the defendant has not met his burden of showing specific prejudice from the lack of a verbatim transcript.

DUE PROCESS

The Circuit Court conducted an exhaustive review of this issue. It has remanded to this Court to determine if the defendant has been prejudiced by the delay in receiving the trial transcript. Using the three-prong analysis in *Barker v. Wingo,* 407 U.S. 514 (1972), the Court finds that the defendant was not prejudiced by the delay.

The central issue in this analysis is whether the defendant has suffered impairment of his grounds for appeal or of his defense in the event of a retrial. As stated earlier the defendant has made no showing of prejudice to his grounds for appeal beyond those already presented to the appellate court in his argument relative to the trial transcript. Presumably because the Circuit Court did not find this sufficient to establish a due process violation as a matter law, it was referring to some additional or specific impairment of the defendant's grounds for appeal. The defendant has made no showing of specific prejudice nor has he alleged any specific prejudice. Therefore the

Court finds the defendant's grounds for appeal were not prejudiced by the delay.

Turning to the trial defense issue, a review of the proof at trial is helpful. The defendant along with two other associates entered and robbed the bank in question. During the trial, two of the bank tellers present during the robbery identified the defendant as being one of the robbers. The three robbers were seen by the Reyes brothers outside the bank and observed getting into a vehicle and driving rapidly away. The brothers wrote down the vehicle license number. It was later learned that the vehicle was registered to the defendant. At trial one of the Reyes brothers identified the defendant as the driver of that vehicle.

A neighbor, a former company commander in the U.S. Army and an Army sergeant, identified the defendant in the bank robbery photographs. Another Army associate, Geoffrey Terry, who is the focus of the *Brady* motion also identified the defendant from the bank robbery photographs.

The defendant admitted that he was in the bank at the time of the robbery to get change for a fifty dollar bill. He denied that he was involved in the robbery. This defense was presented through cross examination. The defendant did not testify.

The proof of the defendant's guilt was overwhelming. The defendant has not alleged any difficulty in presenting his defense if the case were to be retried. Further, the Court after reflecting on the trial and subsequent proceedings independently, cannot identify any impairment to the presentation of the defense case.

The defendant introduced a brief letter regarding his present mental state. It appears that the defendant is now being treated for mental problems at a Veteran's Hospital having been released from custody some time ago. The defendant was examined for mental illness and competency prior to the trial. While the continuation of this matter causes the defendant some concern, it does not appear to be the source of the defendant's present mental difficulties. In any event the Appellate court has already weighed that factor in the defendant's favor.

In the Court's view, an analysis of this case does not lead to the conclusion that the defendant's incarceration has been unjust or oppressive or that his due process rights have been violated.

BRADY ISSUE

The Court finds that the defendant was convicted on March 4, 1986. Thereafter, on March 27, 1986, an agent of the Federal Bureau of Investigation interviewed Clifton Thomas concerning several bank robberies. In this interview Thomas detailed his involvement in these robberies. In the interview Thomas and he had discussed methods of robbing bank tellers with the defendant, Reginald Barrett, and Geoffrey Terry. Two days later on August 30, 1985, Thomas and Terry robbed the First Interstate Bank using the defendant's car as the getaway vehicle.

On September 16, 1985, Thomas, Reginald Barrett, and the defendant robbed the United Bank at 8002 Pacific Avenue in Tacoma, Washington. The proceeds of the two robberies were split between Thomas, Barrett, Terry, and

the defendant. This is the bank robbery for which the defendant was convicted.

The information from the Thomas interview was not provided to the defendant until after sentencing on April 11, 1986 and therefore was not considered by the Court in sentencing.

Geoffrey Terry testified at the defendant's trial. Terry identified the defendant in a bank photograph. He also supported the defendant's theory by testifying that the defendant had told him that he (the defendant) was in the bank to get change for a fifty dollar bill when it was robbed.

The Thomas interview had not been conducted at the time of trial. Therefore, it could not have been provided to the defendant even if it was *Brady* material.

The Court views the statement as being highly inculpatory to the defendant. It does not support the theory espoused by the defendant in this hearing, that it might have been Terry in the bank instead of him. Instead it is yet another piece of damning evidence which undermines the defense theory. Indeed it shows that the defendant was involved in a series of bank robberies, including the robbery for which he was convicted, and that Terry was not present for that particular offense.

The Thomas statement is not a mitigating factor for sentencing purposes. It discloses far more criminal activity than the single robbery. Certainly the defendant would not have received a lesser sentence had the Court considered this information. The opposite is more likely to have occurred.

The Court finds that the statement was not *Brady* material and that there was no *Brady* violation.

WHEREFORE, having made these findings the defendant's conviction shall be reinstated and a new final judgment will enter.

DATED this 21st day of August, 1991.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Robert G. Chadwell
ROBERT G. CHADWELL
Assistant United States Attorney

United States Court of Appeals,
Ninth Circuit

Jeffery ANTOINE, Plaintiff-Appellant-Cross-Appellee,

v.

BYERS & ANDERSON, INC., Shanna Ruggenberg, Defendants-Appellees-Cross-Appellants.

Nos. 90-35293, 90-35362 and 90-35363.

Argued and Submitted Sept. 11, 1991.

Decided Dec. 13, 1991.

* * *

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Jeffery Antoine appeals the district court's grant of summary judgment in favor of Byers & Anderson, Inc. and Shanna Ruggenberg. Antoine asserted constitutional claims for violation of due process and access to the courts plus state law claims for breach of contract as a result of Ruggenberg's failure to produce a criminal trial transcript. The district court held that Ruggenberg, a delinquent court reporter, was absolutely immune as a quasi-judicial officer. Byers & Anderson, Ruggenberg's "employer," and Ruggenberg cross-appeal from denial of summary judgment on the issue of whether Ruggenberg was an independent contractor or an employee. We affirm.

I

Byers & Anderson, a court reporting firm in Tacoma, Washington, contracted with the United States District Court for the Western District of Washington to provide court reporting services. As required by the contract, Byers & Anderson sent Shanna Ruggenberg, one of its court reporters, to provide reporting services for the district court. Ruggenberg had provided court reporting services through Byers & Anderson for approximately one and one-half years.

Ruggenberg performed full-time court reporting services for the district court from February 1986 to August 1986. While working in the district court, Ruggenberg spent business hours at the courthouse and contacted Byers & Anderson daily by telephone or in person. To satisfy the requests for overnight transcripts, excerpts of cases, verbatim reports of proceedings, and transcript requests, Ruggenberg was required to transcribe at home in the evenings and on weekends. She was unable to satisfy all of the requests and soon found herself with a backlog of work.

Ruggenberg served on March 3 and 4, 1986, as the court reporter during Jeffery Antoine's jury trial for bank robbery. Antoine appealed his conviction for this crime. Immediately following the trial, on March 20, 1986, Antoine ordered the transcript of proceedings from Ruggenberg. He made a payment of seven hundred dollars on the transcription fee because he was not aware that he could have obtained a transcript without cost due to his inability to pay.

The court ordered the transcript filed by May 29, 1986. Ruggenberg did not meet this deadline, and did not request an extension. For the next three years, Antoine attempted to obtain the transcripts through motions, court orders and hearings. The court set five subsequent filing deadlines for the transcript. Ruggenberg failed to provide the complete transcript, communicate with counsel, or comply with the orders of the court.

Ruggenberg did produce fifty-eight pages of transcript, but she was unable to locate the notes and tapes for the remainder of the proceeding. In July 1988, over two years after the initial transcript request, Ruggenberg claimed in an affidavit that she had lost the remaining notes and tapes. Subsequently, however, in April of 1989, additional notes and tapes were discovered. These items were delivered to the district court, and a substitute reporter attempted to reconstruct the record pursuant to Fed.R.App.P. 10(c).[1] The substitute reporter was unable to complete a full transcript of the criminal proceeding because the notes alone were insufficient to produce an

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[1] Fed.R.App.P. 10(c) provides: *"Statement on the Evidence of Proceedings When No Report Was Made or When the Transcript is Unavailable.* If no report of the evidence or proceedings at a hearing or trial was made,or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 30 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

adequate transcript. The reconstructed transcript was deficient in that it included no charge to the jury, no transcript of the sentencing, inaudible words or phrases, garbled testimony, and insufficient identification of speakers.

As a result of his delay in obtaining the partial transcript, Antoine's criminal appeal did not proceed to argument until four years after his conviction. In the underlying criminal action, this court vacated his conviction and remanded. We instructed the district court to determine whether Antoine was prejudiced by his lack of a complete transcript, and whether the delay in obtaining his transcript impaired his defense on retrial. *See United States v. Antoine*, 906 F.2d 1379, 1384 (9th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 398, 112 L.Ed.2d 407 (1990). The present status of Antoine's criminal case is unknown.

Antoine filed the present action pursuant to 42 U.S.C. § 1983 (1988). The district court granted Byers & Anderson's and Ruggenberg's motions for summary judgment, holding that Ruggenberg's acts were within her official capacity as a quasi-judicial officer. Summary judgment was denied on Byers & Anderson's assertion that Ruggenberg was an independent contractor and not its employee. The court dismissed Antoine's federal claims and dismissed without prejudice his pendent state law claims.

II

A federal agent acting under authority of purely federal law cannot be held liable under Section 1983.[2] *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir.1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439 79 L.Ed.2d 760 (1984). Because Ruggenberg was a federal, not state, agent, and because Antoine filed his action pursuant to 42 U.S.C. § 1983, we must first determine whether the district court had jurisdiction to adjudicate his claim. Antoine apparently recognized the problem and sought to amend his complaint to set forth the jurisdictional basis as 28 U.S.C. § 1331 (1988), but the claims were dismissed before the amendment became effective. The district court's summary judgment order disposed of the case as if it were a Section 1983 action.

On Appeal, Antoine characterizes his suit as a *Bivens* action. *See* 26 U.S.C. § 1331; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We follow *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385 (9th Cir.1987), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988), and ignore Antoine's initial mischaracterization. In *Mullis*, the action against federal agents was filed as a

---

[2] 42 U.S.C. § 1983 (1988) provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 action instead of as a federal question case. On appeal, this court ignored Mullis' mischaracterization and found jurisdiction in the district court under 28 U.S.C. § 1331. *Mullis*, 828 F.2d at 1387 n. 7. Because immunity in *Bivens* actions is coextensive with immunities recognized in Section 1983 cases, our decision is unaffected by the jurisdictional basis.[3] *See, e.g. Harlow v. Fitzgerald*, 457 U.S. 800, 818 n. 30, 102 S.Ct. 2727, 2738 n. 30, 73 L.Ed.2d 396 (1982); *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909-10, 57 L.Ed.2d 895 (1978); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir.1989). We conclude we have jurisdiction to hear this appeal.

III

A

We review de novo the district court's grant of summary judgment. *Price v. Hawaii*, 939 F.2d 702, 706 (9th Cir.1991). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 867 (9th Cir.1991). Issues of immunity are reviewed de novo. *Doe v. Atty. Gen. of the United States*, 941 F.2d 780, 783 (9th Cir. 1991).

[3] No immunity is expressly provided for in an action brought pursuant to Section 1983. However, Section 1983 was not meant to "abolish wholesale all common-law immunities." *[illegible] v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1938, 114 L.Ed.2d 547 (1991) (quotation omitted). Instead, "this section is to be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 126 (1976)). A similar analysis is applicable to *Bivens* actions.

B

Antoine argues that court reporters are not, as a matter of law, entitled to the protection of absolute quasi-judicial immunity. We disagree.

In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), the Supreme Court confirmed the common law principle that judges have absolute immunity for acts committed within their judicial jurisdiction. The Court described the principle as follows:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.
>
> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the

> settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

Bradley, 80 U.S. (13 Wall.) at 347 (citation omitted).

In elaborating this principle, the Court stated the following with respect to the record of a lawsuit:

> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party – and that judge perhaps one of an inferior jurisdiction – that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amendable by the losing party.

Id. at 349.

Judicial immunity is not limited to judges. It extends to other government officials who play an integral part in the implementation of the judicial function. Such officials enjoy derivative immunity (quasi-judicial immunity) which can be absolute if their conduct relates to a core judicial function. *See Mullis*, 828 F.2d at 1388-91 (bankruptcy judge, court clerk, and bankruptcy trustee covered by absolute immunity); *Sharma v. Stevas*, 790 F.2d 1496, 1496 (9th Cir.1986) (clerk of the United States Supreme

Court has absolute quasi-judicial immunity because the activities are integral to the judicial process); *Stewart v. Minnick*, 409 F.2d 826, 826 (9th Cir.1969) (court reporters are quasi-judicial officers with regard to acts performed in their designated capacities).

With the decision of the Supreme Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 565 (1988), the analysis of what judicial activities are entitled to quasi-judicial immunity was significantly refined. *Forrester* and subsequent cases confirm that a claim of immunity must be analyzed using a "functional" approach. *See, e.g., Burns*, 111 S.Ct. at 1939; *Forrester*, 484 U.S. at 224, 108 S.Ct. at 542-43; *Westfall v. Erwin*, 484 U.S. 292, 296 n. 3, 108 S.Ct. 580, 583 n. 3, 98 L.Ed.2d 619 (1988). "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544 (emphasis added).

In *Forrester*, the Supreme Court limited absolute judicial immunity to actions that are either "judicial or adjudicative." *Id.* at 229, 108 S.Ct. at 545. By contrast, the *administrative* act of a judge in discharging a court employee was held not to be entitled to the protection of absolute immunity because this function was outside the realm of purely judicial activity. *Id.* The Court decided that although employment and other administrative decisions are crucial to the efficient operation of the judicial system, a judge's performance of these tasks does not bring them within the realm of judicial jurisdiction or make them adjudicative. *Id.* at 230, 108 S.Ct. at 545-46. The Court noted that absolute immunity is designed to facilitate independent and impartial adjudication, *id.* at 227, 108 S.Ct. at 544, but is not meant to insulate judicial

officials from all liability for their actions, *id.* at 223, 108 S.Ct. at 642.

Ruggenberg can only receive absolute quasi-judicial immunity if her court reporting activities are part of the adjudicatory function. We conclude that they re.

28 U.S.C. § 753 (1988), known as the Court Reporter Act, gives us the answer to this inquiry. It reads, in relevant part, as follows:

> (b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. . . . Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule of order of court as may be requested by any party to the proceeding.
>
> The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

> The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.
>
> The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.
>
> The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcript of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

28 U.S.C. § 753(b).

There can be no doubt that the making of the official record of a court proceeding by a court reporter is part of the judicial function. That process is inextricably intertwined with the adjudication of claims. The official record reflects evidence taken in the case, the arguments and objections of attorneys, and the ruling of the court. The function of the official record is indispensable to the appellate process. Thus, because the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process, these actions are entitled to absolute quasi-judicial immunity. In this regard, *Mullis* and *Stewart* are unaffected by *Forrester.*[4] Ruggenberg, as a court reporter, is therefore entitled to absolute quasi-judicial immunity for actions within the scope of her authority.

C.

We must next determine whether Ruggenberg acted within the scope of her authority in failing to produce Antoine's trial transcript. Absolute immunity will not attach to judicial officers when they act "clearly and completely outside the scope of their jurisdiction." *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir.1986) (citation

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[4] We reject the Eighth Circuit's reasoning in *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). In *McLallen*, the duties of a court reporter were held to the ministerial, not discretionary, and thus were not protected by quasi-judicial immunity. *McLallen*, 492 F.2d at 1299-1300. *McLallen*, decided before *Forrester*, fails to consider the judicial function performed by the court reporter, and focuses on the discretion of the actor. We reject this approach and choose instead to focus on the nature of the function performed by the court reporter.

omitted). In *Mullis*, the court determined that quasi-judicial immunity would attach if the acts complained of were "within the general 'subject matter jurisdiction' of the [quasi-judicial officer] . . . " *Mullis*, 828 F.2d at 1990 (citation omitted). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir.1986).

The Court Reporter Act requires Ruggenberg to transcribe criminal proceedings. "The reporter . . . designated to produce the record *shall* transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court. . . . " 28 U.S.C. § 753(b) (emphasis added). Ruggenberg was not clearly outside of her jurisdiction in failing to complete the transcript. "Whether an act is judicial 'relate[s] to the nature of the act itself. . . .' " *Ashelman*, 793 F.2d at 1075 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978)). Although Ruggenberg failed to comply with the statute or court orders, Antoine has not shown any action that was not within her responsibilities as a court reporter.

Thus, Ruggenberg is entitled to absolute quasi-judicial immunity despite the impact on Antoine's criminal appeal due to her failure to timely prepare the transcript. "judicial immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.' " *Id.* at 1075 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1872)).

Antoine argues that Ruggenberg's acceptance of the seven hundred dollar payment from him constitutes theft

that would preclude absolute immunity from attaching. We disagree. The acceptance of a fee for transcribing the proceedings, although not thereafter earned, is within the jurisdiction of a court reporter and does not preclude absolute immunity. *See New Alaska Development Corp. v. Guetschow,* 869 F.2d 1298, 1304 (9th Cir.1989) (malice *or* corrupt motive insufficient to deprive a judge of absolute immunity; focus on whether the precise act is a normal judicial function).

D

A party aggrieved by the complete failure of the court reporter to discharge her responsibilities does have remedies. A trial transcript may be reconstructed pursuant to Fed.R.App.P. 10(c), and the Court of Appeals has authority to accord whatever relief might be appropriate pursuant to Fed.R.App.P. 11(b). A district court in the first instance has the power to compel the production of a transcript in the event of a simple delinquency. The final remedy would be to vacate a judgment and remand for a new trial because appellate review was not possible. *See United States v. Anzalone,* 886 F.2d 229, 232 (9th Cir.1989); *United States v. Piascik,* 559 F.2d 545, 547 (9th Cir.1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

The district court did not err in its analysis of alternative remedies. Antoine's criminal appeal was remanded for a finding of whether prejudice had occurred. This was an appropriate remedy under the circumstances of the case. Alternative remedies are available to the private litigant "and to those remedies they must, in such cases,

resort." *Forrester,* 484 U.S. at 228, 108 S.Ct. at 544 (quotation omitted).

E

Because Ruggenberg is entitled to absolute quasi-judicial immunity, the district court correctly determined that Byers & Anderson is likewise not liable to Antoine. This is so regardless of Ruggenberg's employment relation with Byers & Anderson.

IV

Because we find that Ruggenberg was entitled to absolute quasi-judicial immunity, we need not reach the cross-appeals on the denial of summary judgment.

V

Ruggenberg's actions as a court reporter meet the criteria for the application of the doctrine of absolute quasi-judicial immunity. The function of a court reporter is integral to the efficient operation of the judicial system and, as such, is entitled to derivative judicial immunity. Otherwise, unsuccessful litigants could bring suit against the court reporter in their efforts to redress a perceived wrong. This threat of prospective litigation would hinder the efficient and accurate transcription of judicial proceedings. The district court was correct in holding that Ruggenberg was entitled to absolute quasi-judicial immunity and therefore granting summary judgment.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff Appellee,*

v. No. 91-30321

JEFFERY ANTOINE, *Defendant-Appellant.*

OPINION:
Before: Chief Judge Wallace
Circuit Judges Hall and Wiggins
Filed June 25, 1992

Antoine appeals from the reentry of his judgment of conviction. The district court order denied relief following our remand in *United States v. Antoine*, 906 F.2d 1379 (9th Cir.) (Antoine I), *cert. denied*, 111 S. Ct. 398 (1990). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

In Antoine I, we affirmed in part, vacated the judgment, and remanded to the district court to consider three issues: (1) whether Antoine can show specific prejudice arising from his lack of a complete trial transcript; (2) whether, under his due process claim, Antoine can demonstrate that in the event of a retrial, his defense will be impaired as a result [*2] of the delay; and (3) whether Antoine has stated a valid claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Antoine I*, 906 F.2d at 1384. Antoine also appeals from the district court's denial of his motion to hire a psychological expert to determine the extent of his anxiety resulting from the delay of his appeal. This issue was decided in *Antoine I*, *Id.* at 1381-82, and was not an issue on remand. Therefore, we will not address it.

We review the district court's findings of fact for clear error. *United States v. McConney*, 728 F.2d 1195, 1200-01 (9th cir.) (en banc) (McConney), *cert. denied*, 469 U.S. 824 (1984). However, we review mixed questions of law and fact de novo. *Id.*

The district court found that Antoine presented no facts showing specific prejudice. Antoine repeats his argument, unsuccessfully presented in Antoine I, that a violation of the *Court Reporter Act*, 28 U.S.C. § 753(b), coupled with a change of counsel on appeal, requires reversal. Antoine may not relitigate this issue.

Antoine contends that his due process rights were violated as a result [*3] of delay in his appeal. The district court disagreed, finding that Antoine proved no prejudice as a result of the delay. We review this mixed question of law and fact de novo. *McConney*, 728 F.2d at 1202.

In Antoine I, we decided that Antoine could not establish a due process violation absent a showing of prejudice. 906 F.2d at 1382. The prejudice prong requires analysis of three categories of potential prejudice stemming from a delayed appeal: (1) oppressive incarceration pending appeal; (2) anxiety and concern of the convicted party awaiting the outcome of the appeal, and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial. *Id.* We remanded to the district court for factual findings related to the third category. *Id.* at 1383.

The district court reviewed the "overwhelming" proof of guilt presented at trial and found that Antoine was not prejudiced by the delay. Numerous witnesses identified Antoine as one of the bank robbers, as well as

the driver of the escape vehicle, which was registered in his name. Antoine's trial defense was presented almost [*4] entirely through cross-examination of prosecution witnesses. His case-in-chief consisted of recalling one government eyewitness. He argued that he was present in the bank at the time of the robbery, but that he did not participate. Given the evidence against Antoine, and the fact that his defense was based entirely upon a claim that the government had presented insufficient evidence to carry its burden of proof, we agree with the district court that Antoine has not shown that his ability to present a defense in the event of a retrial was prejudiced by the delay.

Antoine has presented no relevant factual argument showing that he was prejudiced by the delay in his appeal. Instead, he relies upon the presumed prejudice arising from his lack of a complete transcript. We have already rejected that argument. In addition, Antoine relies upon the government's alleged violation of Brady as a source of prejudice. Even if this could be considered under Antoine's prejudice argument, it would also be insufficient, as discussed below.

We conclude that the district court properly determined that Antoine suffered no impairment of his grounds for appeal or of his defense in the event[*5] of a retrial.

Antoine argues that the district court erred in concluding that the government did not violate Brady by failing to supply him with information regarding a government witness that would have been material to his

cross-examination. We review de novo Antoine's challenge to his conviction on the basis of Brady. *United States v. Marashi*, 913 F.2d 724, 731 (9th Cir. 1990).

On remand, the district court properly found that the alleged Brady material was not obtained until after Antoine was convicted. The information in question was obtained by the prosecution during an interview with Clifton Thomas, on March 27, 1986. Thomas stated that he, Antoine, and another person conducted the bank robbery at issue in this case. Antoine was convicted more than three weeks prior to this interview, however, on March 4, 1986. Therefore, no Brady violation could have occurred because the allegedly exculpatory information was not in the possession of the government until after trial.

Antoine also argues that the information should have been disclosed, at a minimum, prior to sentencing on April 11, 1986. The district court found that the evidence [*6] implicated Antoine in a series of bank robberies, and that had it been available at sentencing, the court would not have considered it to be a mitigating factor. On the contrary, the district court stated that the evidence would likely have had an opposite effect.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-7604

Jeffery Antoine,

Petitioner

v.

Byers & Anderson, Inc., et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 13, 1992

No. 91-7604

In The

Supreme Court of the United States

October Term, 1992

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Is a federal court reporter who failed to comply with repeated court orders and statutory duties to produce a trial transcript absolutely immune from a claim for constitutional violations?

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BRIEF OF PETITIONER

Petitioner Jeffery Antoine asks the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471 (9th Cir. 1991), *cert. granted*, 121 L. Ed. 2d 240 (1992).

OPINIONS AND JUDGMENTS BELOW

The opinion of the court of appeals is reported at 950 F.2d 1471. The order of the district court granting defendants' motion for summary judgment is set forth in the Joint Appendix ("JA") at 23. Two companion appellate cases relate to Mr. Antoine's criminal appeals. The first, *United States v. Antoine*, is published at 906 F.2d 1379 (9th Cir.), *cert. denied*, 111 S. Ct. 398 (1990). The second is unpublished and set forth at JA 66.

JURISDICTION

The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 13, 1991. Mr. Antoine petitioned the Court for a writ of certiorari on March 13, 1992. On October 13, 1992, the Court granted the petition.

STATUTORY PROVISION

In reaching its decision below, the court of appeals relied in part on the Court Reporter Act, 28 U.S.C. § 753, the pertinent text of which is set forth in Appendix A.

STATEMENT OF THE CASE

Mr. Antoine challenges the grant of absolute immunity to a court reporter who failed to produce a trial transcript, in direct violation of numerous express court orders and in disregard of her duties under statute and court rule. The reporter's blatant disregard of such orders and deadlines resulted in a multi-year delay in Mr. Antoine's appeal of his criminal conviction.

Statement of Facts

During 1986, the United States District Court for the Western District of Washington in Tacoma contracted on an emergency basis with a private firm, respondent Byers & Anderson, Inc., to provide court reporting services. Under the contract, Byers & Anderson sent one of its reporters, respondent Shanna Ruggenberg, to serve as the court reporter during Mr. Antoine's two-day criminal jury trial in March 1986. (JA 17, 24.)

Mr. Antoine was convicted. He appealed, immediately ordered the transcript of the proceedings from Ms. Ruggenberg, and unwittingly paid her $700, unaware that he was entitled to a transcript without charge because of his *in forma pauperis* status. The court of appeals ordered that the transcript be filed by May 29, 1986. Ms. Ruggenberg failed to meet the deadline but did not request an extension of time. More than three years of motions, court orders, and hearings – all directed at obtaining a simple transcript from a two-day trial – followed this initial failure to meet the filing deadline. The court of appeals set five subsequent filing deadlines. Ms. Ruggenberg repeatedly failed to provide the transcript,

request an extension, communicate with counsel, comply with the orders, or offer an explanation for her failure. (JA 20, 24-25, 38, 40.)

Ms. Ruggenberg eventually produced a partial transcript. In July 1988, she stated in an affidavit that she had lost the remaining notes and tapes. In August 1988, the court of appeals ordered the parties to reconstruct the record pursuant to Fed. R. App. P. 10(c). Before the reconstruction, in April 1989, Ms. Ruggenberg suddenly discovered additional notes and tapes, which her counsel delivered to the district court. (JA 22, 24.)

On May 30, 1989, more than three years after Mr. Antoine's criminal trial, a substitute reporter filed a partially reconstructed substitute transcript. The reconstructed transcript remained defective; it included inaudible words and phrases, garbled testimony, insufficient identification of speakers, no charge to the jury, and no transcript of the sentencing. The substitute reporter candidly acknowledged that the transcript was incomplete, since "notes from the trial were not adequate by themselves to produce a complete transcript." She specifically warned that she could not "vouch for the completeness of [sic] accuracy of the transcript." (JA 41, 43.)

Mr. Antoine's criminal appeal was first argued after a delay of four years. On July 9, 1990, the Ninth Circuit vacated and partially remanded his criminal conviction to determine whether he was prejudiced by lack of a complete transcript and whether the delay impaired his defense on retrial. The court refused to order an acquittal and relied in part on the availability of a civil remedy for

any due process violation. *See United States v. Antoine*, 906 F.2d at 1383.

On remand, the district court found that Mr. Antoine could show no specific prejudice in his appeal from the lack of a trial transcript and reinstated his conviction. (JA 45-50.) Mr. Antoine appealed this decision to the Ninth Circuit. On June 23, 1992, more than six years after the initial appeal, the Ninth Circuit affirmed.[1] (JA 66-69.)

Decisions Below

Mr. Antoine filed this action *pro se* in the district court in May 1988, claiming federal constitutional violations and state law breach of contract. He initially characterized the action as a civil rights claim under 42 U.S.C. § 1983. (JA 2.) The court of appeals in the opinion below correctly observed that the jurisdictional basis for the original complaint in the district court was federal question jurisdiction under 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[2] The original mischaracterization did not affect the court's jurisdiction.

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[1] Mr. Antoine's appeal did not affect his sentencing. He remained in prison throughout his first criminal appeal and was released in September 1990.

[2] Just before trial, the district court appointed counsel for Mr. Antoine. Court-appointed counsel corrected the pleading error by substituting a *Bivens* claim in an amended complaint, although the motion for leave to file was not granted because the case was dismissed on grounds of absolute immunity. (JA 31.)

The district court granted defendants' motions for summary judgment, ruling that Ms. Ruggenberg was entitled to absolute immunity because her acts and omissions were within her official capacity as a quasi-judicial officer. The court also found that because the agent, Ms. Ruggenberg, was not liable, the principal, Byers & Anderson, was free of liability. The court dismissed Mr. Antoine's federal claims and dismissed without prejudice his pendent state law claims. (JA 24-31.)

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. (JA 51.) The Ninth Circuit held that a court reporter's activities are "part of the adjudicatory function," and therefore insulated by absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 950 F.2d at 1475. The court of appeals also held that Ms. Ruggenberg had absolute immunity despite her failure to prepare a timely transcript and to comply with court orders and the Court Reporter Act. The court acknowledged the conflict between its holding and that of the Eighth Circuit,[3] which characterizes court reporter duties as ministerial, not discretionary, and thus not protected by absolute immunity.

SUMMARY OF ARGUMENT

Absolute immunity is an extreme measure that shields even the most flagrant constitutional violations. As such, the Court invokes the measure sparingly and only where justified by overriding public policy considerations. In *Forrester v. White*, 484 U.S. 219 (1988), the Court

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[3] *See McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974).

articulated a two-step functional approach to absolute immunity questions: (1) examination of the nature of the official's functions and (2) evaluation of the effect of exposure to liability on the exercise of those functions. Nothing in the Court's long line of precedent, the common law, or public policy justifies absolute judicial immunity for a court reporter. Qualified, rather than absolute, immunity is the presumption.

The hallmark of judicial immunity is a judicial act marked by adjudication and discretion. The Court's decisions distinguish judicial acts from legislative, administrative, executive, or ministerial acts. The essence of a judicial act is adjudicative decisionmaking.

That the function of a court reporter is neither judicial nor adjudicative needs little elaboration. The reporter is a stenographer required by statute to produce a verbatim transcript. 28 U.S.C. § 753(b). The reporter exercises no discretion, makes no decisions, and weighs no evidence. Court reporters do not adjudicate, nor are they "functionally comparable" to judges. The court of appeals' analysis that reporters are "part and parcel of the judicial process" begs the question of whether court reporting is a judicial act. To be part of the process is not sufficient. Absolute judicial immunity requires a judicial act. The character of the function is controlling, not the importance of the act or the title of the actor.

None of the policy considerations that support absolute immunity are present here. Immunity is intended to preserve independence and insulate officials from undue influence and coercion. Unlike others in the court system who receive absolute immunity – judges, prosecutors in

their adjudicatory role, witnesses, and jurors – court reporters exercise no independent judgment, have no discretionary powers to be shaded or chilled, and are not called upon to make unpopular or difficult decisions.

Because court reporters fill a limited, statutorily defined role, the prospect of litigation does not impair the reporters' function. Nor have reporters been subject to a cascade of vexatious, unwarranted claims. Denying court reporters absolute immunity will not hamper the administration of justice; rather, the judicial process will benefit by holding court reporters accountable for inexcusable conduct.

In balancing the court reporters' role in the courts with victims' right to redress constitutional grievances, qualified, rather than absolute, immunity is sufficient. Such a rule follows both the common law – where absolute immunity was granted only for judicial acts – and the majority of circuit and district courts that have considered the issue.

The court of appeals' decision, which cloaks the court reporter's ministerial conduct with the same protection as a judge's adjudicatory function, should be reversed. A court reporter who violates court orders, ignores statutory duties, and totally abdicates her responsibilities should not be granted absolute immunity.

ARGUMENT

The scope of this case is narrow – Mr. Antoine seeks damages for a constitutional violation arising from

Ms. Ruggenberg's[4] failure and refusal to provide a transcript from a two-day criminal trial. Specifically, Ms. Ruggenberg:

1. Disobeyed six court-ordered deadlines for filing the trial transcript;

2. Failed to communicate with counsel about the delays;

3. Represented in sworn testimony to the court that she lost part of the notes and tapes; however, she subsequently discovered additional notes and tapes;

4. Failed to seek an extension or permission for the delays; and

5. Failed ultimately to provide a completed transcript, leaving a substitute reporter to reconstruct a deficient transcript.

Antoine v. Byers & Anderson, 950 F.2d at 1472-73. (JA 53-54.)[5]

Mr. Antoine's only remedy for this now long-completed constitutional violation is an action for damages. As Justice Harlan noted, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Cloaking

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[4] For ease of reference, respondents Ms. Ruggenberg, the court reporter, and Byers & Anderson, the court reporting firm, are collectively referred to as "Ms. Ruggenberg" or "the court reporter."

[5] This case does not raise any issue of judicial immunity for other possible acts by court reporters, such as excusable or negligent errors in transcription or court-approved delays in transcript completion. Nor is the issue of a new trial or other remedy on the merits for lack of a transcript presented here.

the court reporter with absolute immunity will "seriously erode the protection provided by basic constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 505 (1978).

From early common law to the present, the Court has followed a functional approach in determining whether to shield official conduct by absolute immunity. The function and the nature of the acts protected, not the job title, go to the heart of immunity. *Forrester*, 484 U.S. at 224, 227; *Ex parte Virginia*, 100 U.S. 339, 348 (1880). Against this backdrop, the Court is asked to analyze the function of a court reporter.

Section I of this brief outlines the strict standards for grants of absolute immunity. Section II demonstrates why court reporters are not entitled to absolute immunity. Under the Court's functional approach, immunity requires a judicial act. Section II thus describes the ministerial, nonadjudicatory role of a court reporter and explains why court reporting is a stenographic task rather than a judicial act. In keeping with the teaching of *Forrester*, the absence of any compelling public policy basis for absolute immunity is also laid out. Section II ends with a discussion of the lack of any common law precedent for absolute immunity for court reporters, a prerequisite for immunity. Finally, Section III concludes that, at most, court reporters should be shielded by qualified immunity.

I. ABSOLUTE IMMUNITY IS AN EXTREME MEASURE THAT RARELY SHOULD BE INVOKED

Because it "contravenes the basic tenet that individuals be held accountable for their wrongful conduct," *Westfall v. Erwin*, 484 U.S. 292, 295 (1988), absolute immunity is an extreme measure that should be invoked only

sparingly and with great caution, especially without an express constitutional or statutory basis. *Forrester*, 484 U.S. at 223-24. *See also Hafer v. Melo*, 112 S. Ct. 358, 363-64 (1991).[6] "Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." *Forrester*, 484 U.S. at 224. *See Burns v. Reed*, 111 S. Ct. 1934, 1939 (1991); *Malley v. Briggs*, 475 U.S. 335, 340 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982); *Butz*, 438 U.S. at 506.

Whether applied to judges, legislators, prosecutors, or the President, the principle underlying absolute immunity is the same – to preserve independent and impartial judgment and to encourage vigorous and fearless performance of official duties. *Forrester*, 484 U.S. at 223. As to judges, the specific public interest lies in maintaining the independence, impartiality, and efficiency of the judicial process. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-48 (1872). Potential liability can threaten the judiciary's independence, intimidating judges into abandoning their objectivity. *Forrester*, 484 U.S. at 223.

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[6] In determining the existence and scope of immunity, suits against state officials under 42 U.S.C. § 1983, such as *Forrester*, and suits against federal officials brought directly under the Constitution are treated identically. *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (citation omitted).

II. COURT REPORTERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

A. Absolute Immunity Must Be Analyzed Under the Functional Approach

Over the years, the Court has refined a two-step functional approach in deciding absolute immunity questions. This approach seeks to "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester*, 484 U.S. at 224. Echoing the teaching of *Ex parte Virginia*, 100 U.S. at 348, decided over 100 years earlier, *Forrester* emphasizes that absolute immunity hinges on the character of the act rather than the title of the actor.

1. Absolute Judicial Immunity Requires a Judicial Act

The touchstone of judicial immunity is a judicial act that involves adjudication and discretion. In the case of an official other than a judge, the conduct must have "functional comparability" to adjudication, i.e., decision-making. *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976). The test is not whether the conduct is part of the judicial process or important to the administration of justice but whether it is adjudication. Discretion is paramount.

The Ninth Circuit erred in characterizing the court reporter's function as a judicial act because it is "functionally part and parcel of the judicial process." *Antoine*, 950 F.2d at 1476. This conclusory analysis misses the mark

by focusing on the relationship of the act to the judiciary rather than on the character of the act. In addition, its impact is too sweeping; under this approach, there would be blanket immunity for virtually any job in the judicial system because it is "functionally" part of the judiciary. Repeating pro forma the phrase "judicial act" without analysis is not enough.

The Court's decisions illustrate that the Ninth Circuit's approach is incorrect. The Court has never held that the importance of the function or its support of other functions determines absolute immunity. Even crucial functions do not automatically enjoy absolute immunity. Thus, in *Harlow*, the Court explained:

> If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet . . . be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.

457 U.S. at 810 (footnotes omitted). The Court went on to observe that

> [t]he undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the "functional" approach that has characterized the immunity decisions of this Court.

Id. at 811.[7]

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[7] The Court also denied absolute immunity in many other instances where the challenged conduct was important, even essential, to the governmental function served. *E.g., Burns*, 111 S. Ct. at 1944-45 (no absolute immunity for prosecutor's legal advice to police); *Malley*, 475 U.S. at 342 (no absolute immunity for police officer's conduct, even though a "vital part of the administration of criminal justice"); *Harlow*, 457 U.S. at 810 (no absolute immunity for Presidential aides even if essential to functioning of the Presidency).

Similarly, the Court's denial of absolute immunity to a judge for employment decisions follows the Court's long-standing functional approach:

> [W]e think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts – like many others involved in supervising court employees and overseeing the efficient operation of a court – may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative.

Forrester, 484 U.S. at 229.[8] Focusing on the character of the act – administrative – the Court rejected absolute immunity. *Forrester* itself demonstrates that the reporter's conduct was not "judicial or adjudicative." *Id.*

2. "Judicial Acts" Are Marked by Adjudication

Historically, judicial acts[9] are those that are adjudicative, rather than legislative, administrative, executive, or ministerial. *See Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980). In

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[8] *See also Ex parte Virginia*, 100 U.S. at 348-49 (no absolute immunity to judge for improper selection of jurors; importance to the judicial process was not determinative).

[9] Even legal dictionaries recognize that a "judicial act" is one that "involves exercise of discretion or judgment." *See, e.g.*, BLACK'S LAW DICTIONARY 846 (6th ed. 1990).

comparing judges and jurors with prosecutors, the Court noted that "all three officials . . . exercise a discretionary judgment on the basis of evidence presented to them." *Cf. Imbler*, 424 U.S. at 423 n.20. Judicial functions or acts are characterized by the exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, and the declaration or alteration of individual rights and obligations. *See* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 892.

A substantial body of precedent defines judicial acts. Every one of the Court's decisions that granted judicial immunity involved discretionary, adjudicative actions.[10] Traditional justifications for official immunity do not support absolute immunity for nondiscretionary functions. *Westfall*, 484 U.S. at 297.

[10] The court has granted absolute immunity to the following judicial acts by judges: decision to disbar an attorney, *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1869); decision to strike an attorney's name from the rolls of the court, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); entry of judgment accompanied by false statements in an opinion, *Alzua v. Johnson*, 231 U.S. 106 (1913); entry of criminal conviction, although contrary to Supreme Court authority, *Pierson v. Ray*, 386 U.S. 547 (1967); decision to approve a petition, *Stump v. Sparkman*, 435 U.S. 349 (1978); issuance of an injunction, *Dennis v. Sparks*, 449 U.S. 24 (1980); and issuance of an order to bring a public defender into the courtroom, *Mireles v. Waco*, 112 S. Ct. 286 (1991).

3. Court Reporting Is a Stenographic Task, Not a Judicial Act

The judicial acts in the Court's long line of cases recognizing absolute judicial immunity stand in stark contrast to the ministerial, nondiscretionary role of a court reporter. The function of a court reporter is straightforward and well-defined – to record the proceedings verbatim and transcribe and deliver the record promptly upon the request of a court or a party. Nothing more, nothing less. The reporter's role has been described as follows:

> A court stenographer, notwithstanding the fact that he is an Officer of the Court, by the very nature of his work performs no judicial function. His duties are purely ministerial and administrative; he has no power of decisions.[11]

As late as 1942, no federal law required a verbatim report of any judicial proceeding, nor was there any statutory appointment of court reporters or stenographers. By practice, parties agreed upon and paid private stenographers to report proceedings. *Miller v. United States*, 317 U.S. 192 (1942), *reh'g denied*, 317 U.S. 713 (1943).

This practice changed with the 1944 passage of the Court Reporter Act (Jan. 20, 1944, ch. 3, 58 Stat. 3, later codified in 28 U.S.C. § 753). The Act provides for an

[11] *Waterman v. State*, 35 Misc. 2d 954, 232 N.Y.S.2d 22, 26 (1962), *rev'd on other grounds*, 19 A.D.2d 264, 241 N.Y.S.2d 314 (1963), *aff'd*, 14 N.Y.2d 793, 251 N.Y.S.2d 30, 200 N.E.2d 212 (1964), *aff'd*, 17 N.Y.2d 613, 268 N.Y.S.2d 929, 216 N.E.2d 26 (1966).

official reporter and establishes specific duties.[12] "[T]he requirements of 28 U.S.C. § 753(b) are 'mandatory and not permissive.' " *Casalman v. Upchurch*, 386 F.2d 813 (5th Cir. 1967) (quoting *Calhoun v. United States*, 384 F.2d 180, 183 (5th Cir. 1967)).

The production of a transcript is not the product of independent judgment and does not involve decision-making discretion. The task requires only that court reporters follow established procedures and guidelines. *Cf. Westfall*, 484 U.S. at 299 (no absolute immunity for acts following established procedures and guidelines). Court reporting is a classic example of an administrative, ministerial task:

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[12] 28 U.S.C. § 753(b) requires court reporters:

1. To record verbatim each session of the court;
2. To attach the official certificate to the original records and promptly file them with the clerk;
3. To transcribe and certify such parts of the record as may be required by any rule or order of court, unless the proceedings were recorded by electronic sound recording and the original records certified by her and filed with the clerk;
4. To transcribe promptly, upon the request of any party to any proceeding so recorded or of a judge of the court, the original records of the requested parts of the proceedings and attach to the transcript the official certificate, and deliver the same to the party or judge making the request; and
5. To deliver promptly to the clerk a certified copy of any transcript so made.

Federal Rule of Appellate Procedure 11(b) further provides that the court reporter must complete the transcript within 30 days of receipt of any order for that transcript or else request an extension of time from the clerk of the court of appeals.

> When the thrust of a *statutory* command addressed to a public official is unmistakable, his duty to comply with it is "ministerial."

Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342, 346 (D.C. Cir. 1965) (emphasis in original).

In determining whether court reporters deserve absolute immunity, the analysis begins and ends with the simple test of whether a court reporter is "functionally comparable" to a judge. *Butz*, 438 U.S. at 513. Absent the exercise of "independent judgment," the court reporter is not. *Id.* To state, as the court of appeals did, that "court reporting activities are part of the adjudicatory function," *see Antoine v. Byers & Anderson*, 950 F.2d at 1475 (JA 60.), is to miss the distinction between judging and reporting.

Court reporters do not adjudicate. Court reporters do not evaluate evidence and make binding and conclusive decisions. They do not have the power to hear and determine controversies. Nor may they declare or alter the rights and obligations of individuals. Court reporters must transcribe court proceedings verbatim and provide timely transcripts when requested. No discretion is involved in carrying out those duties. Their function, albeit requiring training and practice, is clearly defined and limited by statute.

Although producing a trial transcript is "quite important in providing the necessary conditions of a sound adjudicative system," its importance is no basis for granting immunity. *Forrester*, 484 U.S. at 229. The function of a court reporter is not adjudicative; the reporter does not engage in discretionary "judicial acts." Absolute immunity is inappropriate because

> the doctrine of judicial immunity is meant to protect only judicial acts, which, by definition, are acts requiring judicial discretion. When a judge does not exercise judicial discretion, the policies supporting absolute immunity disappear. A ministerial act requires no discretion . . . .

Joseph Romagnoli, Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 FORDHAM L. REV. 1503, 1513 (1985) (footnotes omitted).

B. No Overriding Considerations of Public Policy Favor Immunity for Court Reporters

The second prong of the *Forrester* test requires evaluation of "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of [official] functions." *Forrester*, 484 U.S. at 224. Although the second prong is essential to a finding of absolute immunity, the court of appeals ignored this aspect of *Forrester*.

Given the sparing recognition of absolute immunity, the Court has made it clear that the burden lies with the official, not the victim:

> Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy.

Id. Rather than supporting absolute immunity for court reporters, public policy argues squarely against it. Absolute immunity is not required to protect court reporters' legitimate exercise of their function, nor will the absence of absolute immunity subject reporters to harassment or

intimidation. Indeed, holding court reporters liable for their statutory duties will encourage compliance and contribute to the effective and speedy administration of justice.

1. The Policies Supporting Absolute Immunity for Government Officials Do Not Apply to Court Reporters

Unique public policy considerations underlie the few situations where the Court has granted absolute immunity.[13] Immunity for key participants in the adjudicatory aspects of the judicial process – prosecutors, witnesses, and jurors – reflects the same policy that supports immunity for judges, namely

> concern that harassment by unfounded litigation would cause a deflection of . . . energies from [their] public duties, and the possibility that [they] would shade [their] decisions instead of exercising the independence of judgment required by [the] public trust.

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[13] The Court's immunity decisions with respect to other branches of government are relevant to the analysis in this case. In *Imbler*, the Court noted that

> our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.

424 U.S. at 421.

Imbler, 424 U.S. at 423. *Imbler* teaches that the absence of absolute immunity "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[14] 424 U.S. at 427-28. Likewise, witnesses must be insulated from self-censorship, and the independence of jurors preserved. *Briscoe v. LaHue*, 460 U.S. 325, 328, 335 (1983).

The Court also accords absolute immunity to executive or administrative officers for adjudicative acts that are "functionally comparable" to those for which judges have absolute immunity. *Butz*, 438 U.S. at 513. In the same vein, federal executive officials are absolutely immune from state tort law liability when the challenged conduct is discretionary and falls within the scope of their duties. *Westfall*, 484 U.S. at 297.

Like judges, legislators perform a decisionmaking function. Legislative immunity is granted to "insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia*, 446 U.S. at 731. Finally, the President of the United States has absolute immunity because of the President's unique Constitutional role. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

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[14] Absolute immunity also has been afforded for prosecutorial functions exercised by "quasi-prosecutors": for example, administrative agency attorneys involved in adjudication. *Butz*, 438 U.S. at 516-17.

All of these officials share in common the exercise of discretion. None of the policy reasons supporting immunity for these officials is implicated in the case of a court reporter.

2. Absolute Immunity Is Not Required to Preserve Independent Decisionmaking

The overriding rationale for judicial immunity is to "[free] the judicial process of harassment or intimidation" to preserve the sanctity of independent decisionmaking. *Forrester*, 484 U.S. at 226. In contrast to judges, however, court reporters make no "decisions," and do not ever find themselves duty-bound to issue bold, courageous, or unpopular rulings. Court reporters exercise no independent judgment. There is no discretion that could be chilled, no decision to be shaded, and no conduct to be intimidated. The essence of a court reporter's ministerial function – recording proceedings verbatim and preparing and delivering transcripts as requested – will not be impaired by permitting legitimate claims under *Bivens* or 42 U.S.C. § 1983.

Moreover, unlike court reporters, officials entitled to absolute immunity are "subject to other checks that help to prevent abuses of authority from going unredressed." *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985); *see Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). Prosecutors are constrained by ethical and professional standards and are subject to professional discipline. *Cf. Malley*, 475 U.S. at 343 n.5 ("[t]he absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity"). Similarly, judges are subject to judicial canons of ethics,

impeachment, disciplinary action, controlling precedent, and appellate review. The President of the United States is subject to impeachment, in addition to the traditional checks and balances arising from the separation of powers. Witness testimony is subject to perjury prosecution and to the "crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Imbler*, 424 U.S. at 440 (White, J., concurring).

Court reporters, on the other hand, are not subject to a mandatory ethical code or professional disciplinary proceedings. Nor do court reporters face removal by the public, as do elected officials such as executives, legislators, chief state prosecutors, and, in some jurisdictions, state judges.

3. Absolute Immunity Is Not Required to Prevent Unwarranted Litigation

Concern over vexatious, unwarranted litigation is a legitimate, although not determinative, consideration in weighing immunity. *Imbler*, 424 U.S. at 437. However, nothing suggests that court reporters will face unwarranted litigation. The majority of federal circuits that have considered the issue hold that court reporters are entitled to qualified, rather than absolute, immunity.[15]

The relatively few decisions on court reporter liability are devoid of any complaint that the courts have

[15] These decisions are discussed *infra* note 30.

been flooded with litigation or that reporters have been hampered in the exercise of their legitimate functions. A statistical review of cases suggests the opposite. For example, the Eighth Circuit rejected absolute immunity for court reporters in 1974. *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). Statistics show that in excess of 20,000 civil cases were docketed in that court from 1975 through 1991.[16] Among these, only four reported cases involved court reporter liability.[17] The same de minimis impact was obtained in the district courts of that circuit, with only two cases reported out of more than 200,000 civil filings.[18] The Second Circuit filings reflect the same absence of any impact as a result of qualified immunity. Available statistics for 1984 through 1991[19] reflect at least

[16] Civil filings include private civil, United States civil, bankruptcy, original proceedings, and prisoner petitions. These figures do not include administrative proceedings and criminal cases. Eighth Circuit filing statistics are compiled from the ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1975 through 1979) and the UNITED STATES COURTS EIGHTH CIRCUIT REPORTS (1980 through 1991).

Obviously, looking at cases filed does not reveal the subject of the cases. But it is striking that so few of the thousands of filings resulted in reported cases on court reporters.

[17] *Smith v. Tandy*, 897 F.2d 355 (8th Cir.), *cert. denied*, 111 S. Ct. 177 (1990); *White v. Murphy*, 789 F.2d 614 (8th Cir. 1986); *Holt v. Dunn*, 741 F.2d 169 (8th Cir. 1984); *Woods v. Dugan*, 660 F.2d 379 (8th Cir. 1981).

[18] *Formanek v. Arment*, 737 F. Supp. 72 (E.D. Mo. 1990); *Woods v. Dugan*, 519 F. Supp. 749 (E.D. Mo.), *vacated & remanded*, 660 F.2d 379 (8th Cir. 1981).

[19] Second Circuit filing statistics are compiled from the ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1988 and 1989) and the UNITED STATES

18,000 civil filings without a single reported case involving court reporter liability following the 1983 ruling in *Green v. Maraio*, 722 F.2d 1013 (2d Cir. 1983). In the district courts of the Second Circuit, only three cases could be found that raised court reporter liability in the more than 160,000 filings for that period.[20]

In any event, although the threat of litigation should not be lightly disregarded, this concern does not itself justify absolute immunity. Justice White has written:

> [T]hese adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials and must necessarily have been rejected by Congress as a basis for absolute immunity under 42 U.S.C. § 1983, for its enactment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decision-making process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question.

COURTS FOR THE SECOND CIRCUIT, SECOND CIRCUIT REPORT (1984 through 1987; 1991).

[20] *Mathis v. Bess*, 761 F. Supp. 1023, *reh'g denied, modified*, 763 F. Supp. 58, *dismissed*, 767 F. Supp. 558 (S.D.N.Y. 1991); *Neville v. Dearie*, 745 F. Supp. 99 (N.D.N.Y. 1990); *Sims v. Sacripanti*, No. 84 Civ. 3196 (JES) (S.D.N.Y. 1986) (slip op.).

Imbler, 424 U.S. at 436-37 (White, J., concurring) (footnote omitted).

Additionally, what counts is not the threat of litigation, but the effect of that threat on the function in question. Because of the nature of court reporters' duties, the threat of litigation cannot affect in any manner court transcripts, except perhaps to improve their quality and assure their existence.[21] Court reporters will face liability not for doing their job but for failing to act despite a clear duty to do so. Liability here is consistent with the Court's view that "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Harlow*, 457 U.S. at 819 (emphasis supplied).

Finally, the courts themselves have ultimate control over any frivolous claims. As the Court noted in *Butz*:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.

438 U.S. at 507-08.[22]

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[21] Indeed, with the advent of audiotape and videotape recording and other technological advances, accuracy will be improved and the chances for error reduced. *See* A COMPARATIVE EVALUATION OF STENOGRAPHIC AND AUDIOTAPE METHODS FOR UNITED STATES DISTRICT COURT REPORTING (Federal Judicial Center 1983).

[22] This point is underscored in the reported decisions of the Eighth and Second Circuits, discussed above. Of the nine cases set forth *supra* in notes 17, 18 and 20, eight were dismissed against the court reporters upon motion.

4. Absolute Immunity Is Not Required to Further the Interests of the Judiciary or the Court Reporter

Fashioning an immunity rule requires balancing court reporters' functions against the costs to victims of constitutional violations. Absolute immunity contravenes the basic tenet that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Thus, absolute immunity is justified only when " 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.' " *Westfall*, 484 U.S. at 295-96 (quoting *Doe v. McMillan*, 412 U.S. 306, 320 (1973)).

Being forced to appeal without a transcript or, as here, with a reconstructed and admittedly inaccurate and incomplete record, creates an inherent risk of error and prejudice. The transcript – not the production of it – is essential to the appellate process. The judicial system should place a premium on enforcement of rules that enhance the administration of justice. Obedience to court orders is crucial to the smooth functioning of the courts. *Walker v. Birmingham*, 388 U.S. 307 (1967). Extending immunity to the dereliction of express statutory duties and court orders directly contravenes public policy and undermines the essence of the rule of law.

C. Historical Precedent Does Not Recognize Absolute Immunity for Court Reporters

Just as public policy does not support immunity, neither does history. The Court has "refused to grant . . . immunity under § 1983" and, by extension, under *Bivens*,[23] where there was no historical or early common law recognition of such immunity. *Burns*, 111 S. Ct. at 1945-46 (Scalia, J., concurring in part and dissenting in part). In analyzing immunity claims, the Court has consistently recognized that the Civil Rights Act of 1871 did not intend to "abolish wholesale all common-law immunities," *Pierson*, 386 U.S. at 554, or to create new immunities. *See Malley*, 475 U.S. at 342. Thus, pre-1872 common law is the starting point: a common-law tradition of absolute immunity is a necessary, although not sufficient, condition for absolute immunity under section 1983 and *Bivens* claims. *Burns*, 111 S. Ct. at 1945 (Scalia, J., concurring in part and dissenting in part).

The burden of proving a common law tradition of absolute immunity rests squarely on the party claiming immunity – here, the court reporter. *Id.* at 1939. No case authority suggests that court reporters enjoyed absolute immunity under early common law. Nor did any other official charged with the task of preparing and providing a transcript of court proceedings enjoy such immunity.[24] To the contrary, court employees could be held liable for

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[23] *See supra* note 6.

[24] The production of a verbatim record of proceedings was not an ordinary part of the judicial process prior to 1871; court reporting became commonplace only in the twentieth century. *See generally* Oswald M.T. Ratteray, *Verbatim Reporting Comes of Age*, 56 JUDICATURE 368 (1973). Hence there was no early common law tradition of immunity for stenographers.

failure to provide timely transcripts. *E.g., Bates v. Foree,* 67 Ky. (4 Bush) 430 (1868) (clerk charged with providing transcript could be liable on bond).

Absolute judicial immunity has a long common law tradition. *See Bradley,* 80 U.S. (13 Wall.) at 347. The early American courts also recognized qualified judicial immunity for certain acts. Although sometimes differing as to which level of immunity was appropriate, the early decisions were virtually unanimous that judges, other officials performing judicial functions, and public officials and employees participating in judicial proceedings had no immunity for purely "ministerial" acts.[25] Immunity attached only to "discretionary" functions or functions requiring the exercise of judgment. *See* THOMAS M. COOLEY, LAW OF TORTS 413 (1880).[26]

Early decisions foreshadowed the functional approach used by the Court today. In determining, for example, that tax assessors performed judicial acts in making assessments, one court observed:

> To make the figures indicating a deduction and to make the deduction itself, on the assessment-

[25] *Wall v. Trumbull,* 16 Mich. 228, 234 (1867); *Reed v. Conway,* 20 Mo. 22, 52-53 (1854); *Barhyte v. Shepherd,* 35 N.Y. 238, 241 (1866); *id.* at 247 (Hunt, J., concurring).

[26] The lone exception to this rule that immunity attached only to judicial or discretionary functions was the rule that "[a] ministerial officer cannot be held liable in such a case, where the precept or order under which he acts comes to him from the proper source, and is within the apparent authority of the body or officer issuing or making it." *Wall,* 16 Mich. at 232-33 (citations omitted). Such immunity could be either absolute or qualified. *See* cases cited *supra* note 25.

> roll, may be conceded to be a ministerial act; but to arrive at the conclusion, by hearing and weighing evidence, judging of its credibility, and comparing the evidence with the provisions of law, that the plaintiff was entitled to a deduction, is as far from a ministerial act as can well be imagined.

Barhyte, 35 N.Y. at 251 (Hunt, J., concurring).[27]

Consequently, absolute immunity applied only to those engaged in discretionary, decisionmaking conduct, such as

> "to military and naval officers in exercising their authority to order courts-martial for the trial of their inferiors; . . . to grand and petit jurors in the discharge of their duties as such; to assessors upon whom is imposed the duty of valuing property for the purpose of a levy of taxes; to commissioners appointed to appraise damages when property is taken under the right of eminent domain; to officers empowered to lay out, alter, and discontinue highways; . . . to members of a township board in deciding upon the

[27] Justice Hunt's analysis was echoed in the Court's later cases addressing judicial immunity, such as *Forrester,* 484 U.S. at 227-28. Where judges perform administrative functions, they are not entitled to absolute immunity, even where such functions can affect judicial performance and require the exercise of discretion. *Id.* at 228-29. *See also Wall,* 16 Mich. at 235 (township board immune when evaluating claims brought against township); *Harrington v. Commissioners,* 2 McCord 400 (S.C. 1823) (road commissioners immune in making assessments); *Freeman v. Cornwall,* 10 Johns. 470 (N.Y. 1813) (overseer of highways immune for judging persons in default); *Easton v. Calendar,* 11 Wend. 90 (N.Y. 1833) (school district trustees immune for tax apportionments).

> allowance of claims; . . . to the collector of customs in exercising his authority to sell perishable property, and in fixing upon the time for notice of sale."

Burns, 111 S. Ct. at 1946 (quoting COOLEY, LAW OF TORTS 410-11). *See generally* EDWARD P. WEEKS, *Damnum Absque Injuria* § 109, at 209-10 (1879), and cases cited therein. Absolute immunity was never applied to nonjudicial acts.[28]

The Court's modern immunity analysis reflects the teachings of the common law. Absolute judicial immunity requires a judicial act.

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[28] Nonetheless, even absolute immunity was not entirely absolute. Many courts refused to allow immunity for conduct beyond or in excess of jurisdiction. *See, e.g., People ex rel. Mygatt v. Supervisors of Chenango County*, 11 N.Y. 563 (1854). *Cf. Stump*, 435 U.S. at 356-57 (no immunity for acts done in "clear absence of all jurisdiction") (citation omitted); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). *See generally* Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 224-33 (1980) (in pre-1872 common law, judges in courts of limited jurisdiction sometimes lost immunity for acts in excess of jurisdiction). *See* cases cited in *Wall*, 16 Mich. at 245-53 (Campbell, J., dissenting).

Immunity also was not available at common law in situations where a public officer *defied* a court order. *Wall*, 16 Mich. at 234-35; *Reed*, 20 Mo. at 50-51 (citing Chief Justice Taney's opinion in *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98 (1845)); *Ferguson v. Earl of Kinnoull*, 9 Clark & Finnelly 251, 263, 275-76, 279-80, 291, 306-07, 311-14 (1842). Hence, even a tribunal charged with performing a judicial act had no immunity for refusal to perform the act, notwithstanding that the tribunal enjoyed absolute immunity for performing it improperly, even maliciously. *Ferguson v. Earl of Kinnoull, supra*.

III. QUALIFIED IMMUNITY ADEQUATELY PROTECTS THE INTERESTS OF COURT REPORTERS

Qualified, not absolute, immunity is the norm, *Burns*, 111 S. Ct. at 1939, and is adequate to protect the interests of most public officials and employees, *see Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992). Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.[29] As Justice White wrote, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. At most, court reporters are entitled to qualified immunity.

Indeed, the majority of federal courts that have considered the issue hold that court reporters are entitled to qualified immunity.[30] In contrast, the court below and the

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[29] The early common law also provided qualified immunity to judicial officers and employees who, although not engaged in adjudication and thus ineligible for absolute immunity, engaged in official acts related to adjudication and requiring discretion. *Burns*, 111 S. Ct. at 1947 (Scalia, J., concurring in part and dissenting in part).

[30] Circuit and district courts in the Second, Third, Fifth, Sixth, Eighth, and Eleventh Circuits afford court reporters qualified immunity. *Green*, 722 F.2d at 1018-19 (qualified immunity for altering transcript); *Rheuark v. Shaw*, 628 F.2d 297, 305 (5th Cir. 1980) (only qualified immunity for failure to provide requested transcripts), *cert. denied*, 450 U.S. 931 (1981); *Slavin v. Curry*, 574 F.2d 1256, 1265 (no absolute immunity for inaccurate trial transcript), *modified, reh'g denied*, 583 F.2d 779 (5th Cir. 1978); *McLallen*, 492 F.2d at 1300; *Mathis*, 761 F. Supp. at 1029

Seventh Circuit are the only circuits to grant absolute immunity to court reporters.[31]

One of the most oft-cited authorities for the denial of absolute immunity to court reporters is the Eighth Circuit's decision in *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974).[32] The court held that absolute immunity does not protect court reporters from a suit for damages for failure to deliver a convicted indigent's transcript within a reasonable time. The court reasoned that because court reporters' duties are ministerial in nature, they are not

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(neither absolute nor qualified immunity for alleged conduct that resulted in a six-year delay in the plaintiff's criminal appeal); *Odom v. Wilson*, 517 F. Supp. 474, 476 (S.D. Ohio 1981) (no absolute immunity for court reporters); *Mourat v. Common Pleas Court*, 515 F. Supp. 1074, 1076 (E.D. Pa. 1981) (only qualified immunity for an alleged purposefully inaccurate and erroneous transcript); *Jackson v. Rowell*, 1992 U.S. Dist. LEXIS 17268 (S.D. Ala. Sept. 2, 1992) (qualified immunity for court reporters).

In dicta, the Fourth Circuit also declined to grant a court reporter absolute immunity. See *McCray v. Maryland*, 456 F.2d 1, 4 (4th Cir. 1972).

[31] *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.) (absolute immunity barred a claim against court reporter for alleged falsification of trial transcript), *cert. denied*, 493 U.S. 956 (1989); *Dellenbach v. Letsinger*, 889 F.2d 755, 763 (7th Cir. 1989) (absolute immunity barred an action arising from two court reporters' alleged participation in a conspiracy to compel the plaintiff to obtain and pay for unneeded and unnecessary transcripts), *cert. denied*, 494 U.S. 1085 (1990).

[32] The Eighth Circuit reaffirmed this qualified immunity holding in two subsequent opinions: *Holt v. Dunn*, 741 F.2d 169, 170 (8th Cir. 1984) (only qualified immunity for delay in preparing criminal transcript), and *Smith v. Tandy*, 897 F.2d 355, 356 (8th Cir.) (only qualified immunity for alleged omission in criminal transcript), *cert. denied*, 111 S. Ct. 177 (1990).

entitled to absolute immunity when they violate constitutional rights. Even then, court reporters are entitled to qualified immunity only if they can demonstrate they were "acting pursuant to [their] lawful authority and following in good faith the instructions or rules of the Court and [were] not in derogation of those instructions or rules." 492 F.2d at 1300.

Qualified immunity would adequately protect court reporters from unwarranted litigation. Court reporters should not be afforded greater protection than cabinet members, FBI agents, Presidential aides, governors, police officers, school officials, or prison officials. Many of these individuals exercise complex discretionary responsibilities that are crucial to government functions. Yet because absolute immunity is such "strong medicine," even these officials are granted only qualified immunity.[33]

In addition, qualified immunity is sufficient to further the policy of preventing frivolous litigation by permitting the quick termination of insubstantial lawsuits at an early stage. *Harlow*, 457 U.S. at 818. Thus, a qualified immunity standard would immunize all but the most egregious conduct by court reporters. Court reporters who make good faith efforts to exercise their statutory duties and follow procedures have nothing to fear from

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[33] *See Malley v. Briggs*, 475 U.S. 335 (1986) (police officers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governors); *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (corrections officers); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (Attorney General); *Anderson v. Creighton*, 483 U.S. 635 (1987) (FBI agents); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (Presidential aides).

the application of qualified immunity. Only those individuals who willfully shirk their statutory duties or defy court orders must answer for their conduct, as they should. The Ninth Circuit erred in rejecting qualified immunity as the standard for court reporters.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX A

28 U.S.C. § 753(b)

§ 753(b).

Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and

proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

No. 91-7604

In The
Supreme Court of the United States
October Term, 1992

JEFFREY ANTOINE,
Petitioner,

v.

BYERS & ANDERSON, INC., AND
SHANNA RUGGENBERG,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF RESPONDENT RUGGENBERG

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QUESTION PRESENTED

Is a federal court reporter entitled to absolute quasi-judicial immunity for acts committed within her official capacity?

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BRIEF OF RESPONDENT SHANNA RUGGENBERG

Respondent Shanna Ruggenberg asks the Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471 (9th Cir. 1991), *cert. granted*, 121 L. Ed. 2d 240 (1992).

STATUTORY PROVISIONS

Respondent relies on the following statute and appellate rules throughout this Brief:

1. Court Reporter Act, 28 U.S.C. § 753, set forth in Appendix A.

2. Federal Rule of Appellate Procedure 10(c) set forth in Appendix B.

3. Federal Rule of Appellate Procedure 11(b) set forth in Appendix C.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, Respondent Ruggenberg has limited her statement of the case to information necessary to correct inaccuracies or omissions in the statement by the Petitioner.

Respondent objects to Petitioner's omission of pertinent facts which clarify Respondent's difficulties in filing a transcript for Petitioner's criminal appeal. Respondent Ruggenberg performed full-time court reporting services for the district court for the Western District of Washington from February 1986 to August 1986. *See Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1472 (9th Cir. 1991), *cert. granted*, 121 L. Ed. 2d 240 (1990). Ruggenberg was required to transcribe at home in the evenings and on weekends in an attempt to satisfy the requests for overnight transcripts, excerpts of cases, verbatim reports of proceedings, and transcript requests. Unable to satisfy all of the requests, Respondent soon found herself with a backlog of work. *Id.*; JA 11.

This backlog in work led to personal financial difficulties for Respondent. JA 11. The situation culminated in Respondent's resignation from her position with Byers & Anderson on November 10, 1986. JA 11.

Respondent also objects to Petitioner's understatement of the district court's findings on remand that Petitioner suffered no specific prejudice in his criminal case arising from the delay in filing and the failure to submit a complete transcript. The district court for the Western District of Washington found that Petitioner was not prejudiced by the lack of a complete transcript. JA 45-46. Nor was the Petitioner's defense impaired by the delay in obtaining a transcript. JA 46-47. The court stated that Petitioner's

"grounds for appeal were not prejudiced by the delay." JA 46-47.

The Ninth Circuit affirmed, concluding that the district court properly determined that Petitioner suffered no impairment of his grounds for appeal due to the delay in his appeal. JA 53. The proof of guilt was overwhelming. JA 52.

SUMMARY OF ARGUMENT

The doctrine of absolute judicial immunity is well-established in our common law. However, judicial immunity protects more than the judicial acts of judges because judicial immunity is meant to protect the integrity of the entire judicial process.

Accordingly, the Court has extended absolute judicial immunity to quasi-judicial officials who perform judicial functions. *See Forrester v. White*, 484 U.S. 219 (1988). Under *Forrester's* "functional" test, the touchstone for quasi-judicial immunity is whether the function of the official is an integral part of the judicial process.

Court reporters are entitled to absolute quasi-judicial immunity because their function of creating the court record is an indispensable and integral part of the judicial process and is "inextricably intertwined with the adjudication of claims." *Antoine v. Byers & Anderson*, 950 F.2d 1471, 1476 (1991).

Petitioner's argument for a discretionary function test misinterprets the meaning of the term judicial function. An act of a quasi-judicial official need not be discretionary before immunity attaches. While discretion may be an attribute of executive immunity, it is not part of the test for judicial immunity. All acts, discretionary and non-discretionary alike,

make up the judicial function. Using labels such as "discretionary" or "ministerial" to exclude particular acts from qualifying as a judicial function is an unworkable test that will only lead to a quagmire of conflicting legal decisions.

The premise that court reporting is a judicial function is also supported by historical analysis. The sanctity of the court record lies at the very foundation of judicial immunity; it is the essence of the judicial process. The official court reporter of today is performing a function that was performed by the judge in earlier centuries. Court reporting is simply a delegation of an integral judicial function from the court to the court reporter.

In addition to satisfying the judicial function test, there are overriding public policy interests which favor absolute judicial immunity for court reporters. For example, if court reporters are not provided with absolute immunity the reporters would be exposed to extensive and vexatious liability from litigants who do not receive relief at trial. Absolute quasi-judicial immunity would prevent court reporters from having to defend against vexatious suits and would prevent any interference or interruption with court reporter and judicial functions.

In addition, many of the problems associated with the preparation of the court transcript are not caused by the court reporter. Rather, they are caused by the financial constraints of the judicial system which often leaves court reporters to face a heavy backlog of work. If civil suits were permitted against court reporters, it would be necessary to litigate the issue of courtroom backlog, further burdening the judicial system.

Absolute immunity will also ensure unbiased reporting. If court reporters are subjected to suits by disappointed

litigants, it could have a prejudicial effect on the neutral function of the court reporter. A court reporter's apprehension over subsequent damages liability might induce the court reporter to censor or alter testimony or create a deficient transcript.

Furthermore, there are ample safeguards to ensure the avoidance or correction of constitutional errors due to the mistakes or wrongs of the court reporter. For example, Federal Rule of Appellate Procedure 10(c) provides a method for restructuring the missing record. In the event that reconstruction of the record is inadequate for appellate review, the trial court's decision can be reversed and remanded for a new trial. As a further safeguard, Federal Rule of Appellate Procedure 11(b) grants a court of appeal the authority and discretion to provide relief which may be appropriate through the judicial process. These safeguards were invoked in Petitioner's case with the ultimate finding that Petitioner did not suffer any prejudice by the delay in preparing a transcript.

Finally, anything less than absolute immunity is insufficient protection for court reporters. Court reporters would have no more protection under qualified immunity than they would if court reporters were afforded no immunity at all.

ARGUMENT

I. COURT REPORTERS ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY.

The doctrine of absolute judicial immunity is well-established in our common law.[1] The Court has adhered to the doctrine for more than a century following *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), which held that a federal judge could not be held accountable in damages for a judicial act taken within that court's jurisdiction. The doctrine continues to be viable today as a method for upholding the integrity of the judicial process. *See Forrester*, 484 U.S. at 219 (affirming absolute immunity for judges performing their judicial functions).

However, judicial immunity protects more than the judicial acts of judges. The goal running throughout the Court's judicial immunity cases is to protect the entire judicial process from harassing or intimidating collateral attacks.[2] *See Forrester*, 484 U.S. at 226. To accomplish this goal, the Court has extended absolute immunity to quasi-judicial officers such as prosecutors and legal counsel. *See Burns v. Reed*, 111 S. Ct. 1934 (1991) (prosecutors absolutely immune while performing their court-related duties); *see also Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutor enjoys same absolute immunity under 42 U.S.C. § 1983 as at common law).

Furthermore, the Court has extended absolute quasi-judicial immunity to witnesses testifying in court and jurors.

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[1] "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . ." *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967).

[2] "With this judicial immunity firmly established, the Court has extended absolute immunity to certain others who perform functions closely associated with the judicial process." *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985).

See Briscoe v. LaHue, 460 U.S. 325, 328 (1983); *see also Yaselli v. Goff*, 275 U.S. 503 (1927), *aff'g* 12 F.2d 396 (2d Cir. 1926) (discussing common law precedents extending absolute immunity to judges, grand jurors, petit jurors, advocates, and witnesses).

Recently, the Court has refined a two-step approach for analyzing the issue of judicial and quasi-judicial immunity. Courts "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and then determine whether an exemption from liability is justified by overriding considerations of public policy. *Forrester*, 484 U.S. at 224.

Under this approach, no leap in analysis is necessary for the Court to extend absolute immunity to court reporters, whose duties are an integral part of the judicial process, *i.e.*, the adjudication of claims.[3] Accordingly, the Court should affirm the decision of the Ninth Circuit because Ms. Ruggenberg is absolutely immune from damages

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[3] The extension of absolute quasi-judicial immunity to auxiliary court personnel, including court reporters, is not a new or novel idea. There are numerous cases in the lower circuits and state courts where absolute immunity was afforded to court personnel. *See, e.g., Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992); (absolute immunity for court clerks performing nonmechanical functions integral to judicial process); *Mullis v. U.S. Bankruptcy Court, District of Nevada*, 828 F.2d 1385 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988) (absolute immunity for court clerks when performing tasks that are an integral part of the judicial process); *Sharma v. Stevas*, 790 F.2d 1486 (9th Cir. 1986) (clerk of the United States Supreme Court has absolute immunity because activities are integral to the judicial process); *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976) (receivers absolutely immune even though engaged in ministerial acts); *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969), *cert. denied*, 396 U.S. 941 (prothonotaries absolutely immune); *Ford v. Kenosha County*, 160 Wis. 2d 485, 466 N.W.2d 646 (1991) (clerical personnel preparing a bench warrant perform a quasi-judicial act and are absolutely immune); *Stanton v. Chase*, 497 A.2d 1066 (1985) (absolute judicial immunity for bailiff performing ministerial functions).

resulting from her actions as an official court reporter for the federal district court.

A. Court Reporters Perform Judicial Functions Because Their Duties Are an Integral Part of the Judicial Process.

Under the functional approach, the Court must distinguish between the official's judicial functions and any administrative, legislative, or executive functions the official may perform. *Forrester*, at 227. Because the court reporter's tasks of recording and transcribing is an integral part of the judicial process, such tasks are not administrative, legislative or executive functions. The tasks are judicial functions subject to absolute quasi-judicial immunity.

1. A Judicial Function Encompasses More Than a Judicial Act.

Petitioner argues that the test for judicial immunity "is a judicial act that involves adjudication and discretion." Petitioner's Brief at 11. Petitioner interprets the term "judicial act," and hence the judicial function test, much too narrowly. While the judicial function test includes within its parameters "judicial acts" as defined by Petitioner, not every act of a quasi-judicial official must be adjudicative or discretionary before immunity attaches. The touchstone is whether the function the official performs is an integral part of the judicial process.[4]

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[4] The definitions of the terms "judicial" and "judicial function" in Black's Law Dictionary support equating the term "judicial function" with acts that are an integral part of the judicial process. The term "judicial" is defined as "[r]elating to or connected with the administration of justice . . . ." *Black's Law Dictionary* 846 (6th ed. 1990). Furthermore, the term "judicial function" is defined as "those modes of action which appertain to the judiciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers. *Id.* at 848. A judicial function is much broader than a judicial act as defined by Petitioner.

The "judicial act" concept was derived from the jurisdictional limitation on immunity which developed from early English law. *See generally* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 Duke L.J. 879 [hereinafter Block]. Immunity for a judge was limited to "any thing done by him *as Judge*." *Id.* at 887 (citing *Floyd v. Barker*, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607)) (emphasis added). This jurisdictional limitation has carried over into contemporary judicial immunity decisions which emphasize the necessity that the challenged function fall within the realm of judicial proceedings. The normal attributes of a judicial proceeding include a case or controversy, the presence of litigants, a trial or hearing, and the taking of testimony under oath. Actions outside of the arena of judicial proceedings are not entitled to immunity.

For example, in *Stump v. Sparkman*, 435 U.S. 349 (1978) the Court focused on Judge Stump's jurisdiction in approving, *ex parte*, a mother's petition for the sterilization of her daughter. The Court stated that "the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.* at 362.[5]

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[5] In *Stump v. Sparkman*, the Court referenced the definition of a judicial act as articulated in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972). *Stump*, 435 U.S. at 1107. The *McAlester* court listed the following four factors to consider in determining whether a judge engaged in a judicial act:

> (1) the precise act complained of . . . is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

Id. at 1282.

In *Burns v. Reed*, 111 S. Ct. 1934 (1991), the Court's most recent decision on quasi-judicial immunity, the jurisdictional component of immunity was highlighted. The Court stated that an Indiana state prosecutor was absolutely immune for his conduct in a probable cause hearing before a judge. However, he was only entitled to qualified immunity for his conduct in providing legal advice to the police. *Id.* at 1940, 1943. The Court distinguished between actions that are part of the judicial process and actions that are outside the realm of purely judicial activity:

> Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. . . . That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.

Id. at 1943 (citation omitted).

With regard to an official court reporter, the function of creating the court record is an indispensable and integral part of the judicial process. The official court reporter transcribes the testimony of the witnesses as well as the arguments of counsel and the rulings of the court. In essence, the court reporter acts as the ears of the court and is subject to the court's direction and control. For example, if a question or response is unclear, the court reporter may be requested to read it back to the court for clarification. A transcription of the court record may assist the court in weighing the evidence and, the transcript becomes the uncontrovertible record of the proceedings for purposes of appeal. In short, the creation of the court record "is inextricably intertwined with the adjudication of claims." *Antoine*, 950 F.2d at 1476.

2. Discretion Is Not a Necessary Element of the Judicial Function Test.

Petitioner's primary argument against affording court reporters absolute immunity is premised on an alleged lack of discretionary decision-making. According to Petitioner, "[d]iscretion is paramount." *See* Petitioner's Brief at 11.

Petitioner's argument misconstrues the parameters of the judicial function test promulgated under *Forrester*. Again, the test is whether the court reporter's function is judicial in nature, *i.e.*, whether it is part of the judicial process. Even acts that may be labelled "ministerial" or "non-discretionary" are entitled to judicial immunity if the acts support the judicial process in its adjudication of claims. *See Thompson v. Duke*, 882 F.2d 1180, 1184-85 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (all acts, whether decision-making acts or not, comprise the judicial function regardless of their isolated importance); *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (clerk's issuance of warrant, although non-discretionary, was a "truly judicial act" and protected by absolute immunity).

The Court's decision in *Briscoe v. LaHue*, 460 U.S. 325 (1983), exposes the fallacy of Petitioner's argument. In *Briscoe*, the Court extended absolute quasi-judicial immunity to witnesses who testify at trial and affirmed the dismissal of a damages action against a police officer who committed perjury in a criminal trial. The need to protect the integrity of the judicial process warranted immunity for witnesses who testify at trial. *Id.* at 334-335.

In *Briscoe*, the discretion of the witness was not at issue, as witnesses are not afforded discretion in their testimony. Nor was the role of the witness adjudicatory in nature. Witnesses take an oath to state the truth, and nothing but the truth. If a witness strays from the truth, the witness is subject to criminal punishment for perjury.

The purpose of providing a witness with absolute immunity is to protect the truth-finding process. The witness is relieved of the fear of subsequent liability which might influence the witness to distort their testimony. *Id.* at 333-334. As *Briscoe* teaches, the reason for judicial immunity is to protect the integrity of the judicial process, not simply to shield discretionary or adjudicatory decision-making from the chilling effects of potential damages suits.

If discretion had been the test for immunity in *Forrester*, Judge White would have been afforded absolute immunity, for a judge has discretion to hire and fire a staff within the guidelines of applicable labor laws. *C.f., Thompson v. Duke*, 882 F.2d at 1182 (discussing *Forrester's* holding that Judge White's decision to demote and discharge a probation officer was within his prerogative under Illinois law, but was not a judicial function).

3. Discretion Is a Necessary Element of Executive Immunity Not Judicial Immunity.

An inquiry into whether discretionary decision-making is part of an official's duties is only pertinent to officials in the executive branch of government, not the judicial branch. *See Westfall v. Erwin*, 484 U.S. 292 (1988); *Saul v. Larsen*, 847 F.2d 573, 575-76 (9th Cir. 1988) (test for executive branch immunity is whether the federal official's conduct was within the scope of official duties and whether the conduct was discretionary).

The body of common-law judicial immunities has developed separately and more extensively than executive or legislative immunities. While the President of the United States is afforded absolute immunity based on his "unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), for other executives qualified immunity is the norm. *See Harlow v. Fitzgerald*, 457 U.S. 800

(1982); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In the legislative context, the parameters of absolute immunity for legislative functions are defined by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1. *See Forrester*, 484 U.S. at 224.

In contrast, the need for a completely independent judiciary has led to a solidly established and comparatively sweeping form of immunity for the judicial branch. *See Forrester*, 484 U.S. at 225;[6] *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). Petitioner's reliance on immunity decisions involving officials of the executive branch of government is therefore misplaced. Because court reporter immunity is derived from judicial and not executive immunity, discretion need not be part of a court reporter's function in order to find a court reporter immune from suit.

The most oft-cited decision for denying absolute immunity to court reporters due to an alleged lack of discretion is *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974), a case also relied upon by Petitioner. In *McLallen*, the Eighth Circuit stated that a court reporter's duties were "ministerial" and non-discretionary. Therefore, court reporters were not entitled to quasi-judicial immunity from damages arising from the performance of their court reporter duties. *See McLallen*, 494 F.2d at 1299-1300.

However, following the *Forrester* decision, cases like *McLallen* and its progeny are no longer the proper basis for analyzing court reporter immunity. As the Ninth Circuit noted in *Antoine*, the *McLallen* case, which was decided before *Forrester*, "fails to consider the judicial function

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[6] "[W]e cannot pretend that we are writing on a clean slate or that we should ignore compelling reasons that may well justify broader protections for judges than for some other officials." *Forrester*, 484 U.S. at 226.

performed by the court reporter, and focuses on the discretion of the actor. We reject this approach and choose instead to focus on the nature of the function performed by the court reporter." *Antoine*, 950 F.2d at 1476, n.4.[7]

The use of labels such as "discretionary" or "ministerial" to exclude particular acts from qualifying as judicial functions creates a test that simply does not work in the judicial arena. Judges carry out ministerial or non-discretionary acts frequently during the course of judicial proceedings. This is because judges are subject to mandatory court rules and procedures, especially in the criminal arena, and the rules do not provide for discretionary decision-making. *See Thompson v. Duke*, 882 F.2d at 1184 ("In the continuum of judicial proceedings some judicial acts require extensive exercise of a judge's decision-making skills and others do not — yet all such acts make up the judicial function regardless of their isolated importance").[8] If the test for judicial immunity was

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[7] Some circuit courts continue to hold that discretion is part of the judicial function test. *See Smith v. Tandy*, 897 F.2d 355 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 177 (1990) (citing *Holt v. Dunn*, 741 F.2d 169 (8th Cir. 1984) which reaffirmed the discretionary test for judicial immunity); *Jackson v. Rowell*, 1992 U.S. Dist. LEXIS 17268 (S.D. Ala. Sept. 2, 1992) (citing *Slavin v. Curry*, 574 F.2d 1256, *modified, reh'g denied*, 583 F.2d 779 (5th Cir. 1978), which rejected absolute immunity because a court reporter's work is not discretionary). Adherence to the discretionary inquiry is the paramount reason these courts have refused to find court reporters absolutely immune. However, the courts continue to rely on cases decided before *Forrester* and fail to recognize that discretion is not the proper inquiry.

[8] In *Thompson*, the Seventh Circuit analogized to the consequences that a judicial immunity test, which attempted to draw a line between discretionary acts and "mechanical or routine" acts, would have on judges:

> If scheduling a hearing is not a part of an adjudicatory or judicial function, then an action could be maintained against a judge for

(continued)

based on the discretionary character of the act, every disappointed litigant could invoke some non-discretionary or ministerial act as the basis of a lawsuit. This would defeat the judicial immunity doctrine's purpose of protecting the judicial process from vexatious collateral attacks. *See Forrester*, 484 U.S. at 225.

There can be no bright line drawn between acts that are discretionary and acts that are not. Many judicial acts have discretionary and non-discretionary attributes. To break down each individual act committed in the course of the judicial process and analyze that act for attributes of discretion will only lead to a quagmire of conflicting legal decisions.[9]

(continued)

> injuries to an incarcerated defendant resulting from the judge's alleged failure to schedule a hearing or trial within an applicable speedy trial limitations period, or the judge's alleged failure to conduct a hearing or trial on the date scheduled. By the same token, if the judge purportedly failed to properly execute his duty to advise a criminal defendant of certain statutory or criminal rights, yet accepted a guilty plea and incarcerated the defendant, under Thompson's rationale an action could be maintained against the judge for damages liability if the defendant is injured while in custody awaiting the outcome of his challenge to the court's methodology.

Thompson, 882 F.2d at 1185.

[9] The Seventh Circuit's analysis in *Thompson* is instructive. A prisoner brought an action against various parole board officials alleging that their failure to schedule and conduct a timely parole violation hearing constituted deprivation of his constitutional rights. Thompson claimed that these "administrative" acts were not entitled to quasi-judicial immunity. *Thompson*, 882 F.2d at 1183. In affirming the grant of absolute immunity to the parole board officers, the Seventh Circuit stated that the duty to schedule and conduct a parole violation hearing, "while perhaps routine in many cases, is obviously an integral judicial (or quasi-judicial) function subject to absolute immunity." *Id.* at 1184. The court also noted that judicial officers would be subjected to "unlimited litigation" if the test of immunity focused on the whether a judicial act was "mechanical or routine." *Id.* at 1184-85.

A workable definition for judicial immunity is created when the focus of the inquiry is on the function the act serves. This also properly protects the integrity of the judicial process. Thus, all auxiliary judicial personnel whose acts are integral to the judicial process are then clothed with judicial immunity regardless of the discretionary or non-discretionary character of their acts.

This argument in no way concedes that Respondent Ruggenberg's conduct as a court reporter was devoid of discretionary attributes. The framework in which court reporters function allows them to exercise discretion in fulfilling their responsibilities to the court and to litigants. In terms of the reporting function itself, a court reporter uses discretion in taking testimony. A transcript is by no means a perfect record of the trial, and a court reporter must frequently interpret gestures by the witness such as affirmative nods of the head, or clean up the transcript by removing meaningless exclamations by the court or counsel such as "uhm," "you know," and the like.

The court reporter also exercises discretion in the transcription of the record itself. For example, in this case the record reflects that Ruggenberg had a heavy backlog of requests for transcripts. JA 52. The manner and order in which she dealt with this backlog was within her discretion.[10]

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[10] Petitioner's argument that the statutory 30-day time limit for preparing transcripts deprived Ruggenberg of any discretion in the matter ignores the reality of the situation. Court reporters are routinely given extensions of time as evidenced by several extensions granted to Ruggenberg in this case. JA 53. The courts recognize that the overburdened judicial system makes strict compliance with such rules nearly impossible.

4. Historical Analysis Supports Respondent's Argument That a Court Reporter's Function Is Judicial.

In determining whether immunity should extend to a certain class of officials, the Court has frequently conducted a historical inquiry, analyzing both early American and English decisions to determine if the common law provided such immunity. *See, e.g., Burns v. Reed*, 111 S. Ct. 1934 (1991); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *see also* Block, at 879.

Petitioner argues that court reporters are not entitled to immunity because there is no historical or common law recognition of court reporter immunity. *See* Petitioner's Brief at 27. Petitioner's argument is fundamentally flawed. While court reporting did not become a common practice until the twentieth century, *see* Oswald M.T. Ratcliffe, *Verbatim Reporting Comes of Age*, 56 Judicature 368, 368-370 (1973), the function of making a record of the court proceeding dates back to the earliest English law. Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. Rev. 201, 207 (1980) [hereinafter Feinman & Cohen].

The importance of the court record lies at the very foundation of judicial immunity. In early English law the doctrine of sanctity of records evolved which prevented the time consuming challenges to the findings of fact by the king's court. *See* Block, at 883. Under the doctrine of sanctity of records, the record of the court was considered the final word, superior to all other records.[11] The doctrine was first applied in the court in which the king sat in person,

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[11] The record of the king's court was originally written in Latin on rolls of parchment. *See* Block, at 883.

and this privilege was extended to all the king's courts as they expanded. *Id.* The doctrine of sanctity of records thus lent a degree of finality to judgments by eliminating attacks on the record. *See* Block, at 884; *see also* Feinman & Cohen, at 206 ("Since the record of the court was incontrovertible, no party could allege that an act noted therein was wrong, and thus the source of the record — the judge — could not be subject to civil and criminal liability for an abuse of power.").[12]

The sanctity of records doctrine in turn led to a system of appeal of the court's legal conclusions to a higher court of law. *See* Block, at 883. In order for the appeal system to be authoritative, however, collateral attacks in the nature of actions against judges needed to be eliminated. The doctrine of judicial immunity therefore developed to eliminate these collateral attacks on the record. *See* Block, at 885.

This English form of judicial immunity, with its purposes of discouraging collateral attacks on the record and

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[12] The historical importance of the doctrine of sanctity of records in creating judicial immunity is emphasized in a case reported in one of the books of Assizes:

> J de R was arraigned for that, whereas he was a justice to hear and terminate felonies and trespasses, and whereas certain persons were indicted for trespass, he made entry in his record that they were indicted for felony. And judgment was demanded for him [for all that he did] from the time that he was justice by commission, and that which he [the accuser] presents will be to undo his record, which cannot be by law if to such presentment the law puts him to answer. And it was the opinion of the justices that the presentment was bad.
>
> The only recourse open to the suitor in such a case was to attack the [legal conclusions in the] record by writ of error, founded either on the record or on a bill of exceptions to a ruling of the judge.

6 W. Holdsworth, *A History of English Law* 235-36 (2d ed. 1937).

creating an appellate system of review, was adopted by the American courts. In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872), the Court found that judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."

The official record is the essence of the judicial process. It reflects the evidence taken in the case and the decision of the court. As the history of judicial immunity reveals, an attack on the maker of the record is an attack on the judicial process itself.[13] The court reporter is acting as an arm of the judge in taking the testimony of the trial, and is entitled to judicial immunity for performing this integral function.

Moreover, the official court reporter of today is performing a function that was performed by the judge in earlier centuries. Although appellate review in earlier years differs greatly from current appellate review, judge's notes were sometimes used as the court record up until the twentieth century. *See* John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 19 (1983). For example, in English capital cases, trial judges were consulted in response to a petition for clemency, and the trial judges would invariably rely on their trial notes to frame their replies. *Id.* Judges were also known to enter remarks directed at post-verdict proceedings. *Id.* at 20. All such actions were entitled to judicial immunity.

While this method for reporting trial proceedings and recording evidence may differ vastly from today's verbatim

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[13] "Impugning the integrity of the record verged on impugning the integrity of the monarch." Feinman & Cohen, at 207.

recording of proceedings, it is uncontroverted that judicial immunity attached to the court record and judge's notes of the proceedings.

It is irrelevant that court reporters were unknown in early common law and, therefore, not involved in the recording function. Historically, the source of the court record was the judge, and it is from the court record that immunity emerged. Accordingly, the current source of the court record, the official court reporter, is entitled to absolute immunity for this task, for "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988).

B. Public Policy Considerations Support Judicial Immunity for Court Reporters.

In addition to viewing court reporting as a judicial function, there are overriding public policy interests which favor absolute judicial immunity for court reporters. As discussed below, absolute immunity for court reporters serves the interests of the administration of justice without affecting substantial rights of litigants.

1. Excluding Auxiliary Court Personnel From the Protections of Absolute Judicial Immunity Places Court Reporters at Undue Risk for Lawsuits by Disappointed Litigants.

It is well established that litigants are precluded from suing judges for actions arising from the performance of their judicial functions. *Forrester v. White*, 484 U.S. 219, 224 (1988). However, when dealing with the application of the judicial immunity doctrine to auxiliary judicial personnel, there is the strong "danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts . . . ." *Kincaid v. Vail*, 969 F.2d 594, 601

(7th Cir. 1992) (*quoting Scruggs v. Moellering*, 870 F.2d 376 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989)). The disappointed litigant would be undeterred by the dismissal of the judge from the lawsuit on the basis of immunity. The lawsuit would likely continue against any remaining targets such as the court reporters and other auxiliary judicial personnel.

A typical example of the disappointed litigant scenario arises when a litigant alleges a conspiracy between the judge and the quasi-judicial staff, including court reporters. *Scruggs*, 870 F.2d at 377. It would be anomalous to permit the judge to be dismissed in the typical conspiracy charge case, but require all other quasi-judicial staff to continue to defend against the suit. It is unfair to "spare the judges who give orders while punishing the officers who obey them." *Valdez v. City of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

Moreover, court reporters would be exposed to extensive liability if they are not protected from litigants who do not receive relief at trial. This exposure to potential multi-million dollar lawsuits would be enough to dissuade even the most competent court reporter from accepting courtroom employment, and this would have a detrimental effect on an already overburdened judicial system.

Petitioner nevertheless argues that immunity should not be given to court reporters for the express dereliction of their duties. Petitioner's Brief at 26. If Petitioner's argument were extended to its logical conclusion, it would give rise to a potential cause of action in every case where the statutory 30-day deadline for preparing a transcript was not met. *See* Court Reporter Act, 28 U.S.C. § 753, set forth in Appendix A.

Court reporters often face a heavy backlog of work in many jurisdictions, as evidenced by the facts in this case and by the facts in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980),

cert. denied, 450 U.S. 931 (1981). The financial constraints on the judicial system which preclude courts from employing additional reporters are generally responsible for the backlog. *Id.* at 301. If civil suits were permitted against court reporters it would be necessary to litigate the issue of courtroom backlog. This would require an intensive factual inquiry into the courtroom functions and procedures. At the very least, the inquiry would be disruptive to the judicial process. At the very worst, the inquiry would aggravate the problems of judicial backlog and delay.

2. Providing Court Reporters With Absolute Immunity Protects the Judicial Process From Vexatious Litigation.

"Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 111 S. Ct. 1934, 1943 (1991). Vexatious lawsuits interfere with the duties of judges and quasi-judicial officials alike. *See id.*; *Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992). Consequently, the Court has recognized that there is a broader policy underlying judicial immunity than simply protecting judges from vexatious litigation. Because court reporters are an integral part of the judicial process, the policy for immunity extends to them as well. *Kincaid*, 969 F.2d at 601.

As the Court noted in *Briscoe v. LaHue*, 460 U.S. 325 (1983), a case that goes to trial always imposes significant emotional and financial costs, amongst other things, on every party litigant; even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources. *Id.* at 343-344.

These effects on the court reporter and the court system demonstrate that the greater public good is served by

preventing all suits against court reporters. Absolute quasi-judicial immunity would prevent court reporters from having to defend against vexatious suits and would prevent any interference or interruption with court reporter functions.

3. Fear of Litigation Could Have an Untoward Effect on the Court Reporter's Duties.

Subjecting court reporters to suit by disappointed litigants could have an untoward effect on the neutral function of the court reporter. A court reporter's apprehension of subsequent damages liability might induce the reporter to censor or alter testimony in a manner that would favor the feared litigant, and the simple act of changing a "yes" to a "no" could have a decisive effect on the outcome of an appeal. A court reporter may even create a deficient transcript for the purposes of providing the feared litigant with the opportunity to have a verdict vacated and remanded as happened in Petitioner's underlying criminal action. Such results would severely undermine the integrity of the judicial process.

4. There Are Court Rules and Judicial Mechanisms Which Can Be Used to Prevent Court Reporters From Abusing Their Authority and Taking Advantage of Immunity.

Crucial to the public policy analysis is the ability to correct mistakes or wrongs "through ordinary mechanisms of review." *Forrester v. White*, 484 U.S. 219, 227.[14] As shown

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[14] As stated by Justice Powell in his dissent in *Stump v. Sparkman*, 435 U.S. 349, 370 (1980):

> Underlying the *Bradley* immunity, then, is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights.

by the history of this case, there are ample safeguards to ensure the avoidance or correction of constitutional errors due to the mistakes or wrongs of the court reporter.

To begin with, the federal rules specifically contemplate situations where no transcript is available, and the rules provide a method for restructuring the missing record. *See* Federal Rule of Appellate Procedure 10(c) set forth in Appendix B. This alternative method is permissible if it provides the appellate court with an "equivalent report of the events at trial from which the appellant's contentions arise." *United States v. Smaldone*, 583 F.2d 1129, 1134 (10th Cir. 1978).

In the event that reconstruction of the record is inadequate for appellate review, the trial court's decision can be reversed and remanded for a new trial. *See, e.g., United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir. 1989); *United States v. Piascik*, 559 F.2d 545, 547 (9th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). In Petitioner's underlying criminal action, the Ninth Circuit vacated Petitioner's conviction and remanded the case back to the trial court for determination of whether Petitioner suffered any specific prejudice for the lack of a complete transcript. *See United States v. Antoine*, 906 F.2d 1379 (9th Cir.), *cert. denied*, 111 S. Ct. 398 (1990). The trial court specifically found that Petitioner had not suffered any prejudice by the lack of a complete and timely appellate record. JA 45. This decision was then subject to further appellate review and affirmed by the Ninth Circuit in an unpublished opinion. JA 66.

As a further safeguard, Federal Rule of Appellate Procedure 11(b) gives a Court of Appeals the authority and discretion to provide relief which may be appropriate through the judicial process. *See* Federal Rule of Appellate Procedure 11(b), set forth in Appendix C. Specifically, the court can

find a court reporter in contempt and impose fines and or jail time to the offending party. The Ninth Circuit found it necessary to impose both penalties in this case. JA 24.

Consequently, court rules and judicial mechanisms protect the court system and litigants from any abuses that may arise under a system of absolute quasi-judicial immunity for court reporters. There would be no recurring harm to individual citizens if court reporters were absolutely immune from suit.

II. QUALIFIED JUDICIAL IMMUNITY DOES NOT ADEQUATELY PROTECT THE INTERESTS OF COURT REPORTERS.

Petitioner incorrectly argues that qualified immunity adequately protects the interests of court reporters. Petitioner's Brief at 31-34. There is a significant procedural difference between absolute and qualified immunity. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13.

Consequently, if court reporters are protected by absolute judicial immunity, any lawsuit brought against them can be defeated with a motion to dismiss for failure to state a claim upon which relief may be granted. However, if court reporters are only protected by qualified judicial immunity, they must plead the immunity as an affirmative defense and establish the defense through evidence either on a motion for summary judgment or at trial. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The defense is defeated if there is

objective evidence showing that court reporters violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The difference between absolute and qualified immunity is significant and very important for court reporters. Because of the heavy work backlog many court reporters face discussed above, court reporters are often unable to comply with the 30 day statutory deadline for filing a transcript with the court of appeals. *See* Federal Rule of Appellate Procedure 11(b) set forth in Appendix C. The problem created by work backlogs provides many potential opportunities for a plaintiff to establish that a court reporter violated a clearly established statutory right. Furthermore, although the court reporter can file an extension of time to complete the transcript under Fed. R. App. P. 11(b), repeated requests will ultimately result in a due process claim against the court reporter.

Thus, contrary to Petitioner's argument, it would not only be those court reporters who willfully shirk their statutory duties who would be left unprotected by some form of immunity. Petitioner's Brief at 34. Qualified immunity for a court reporter would be unavailable as a defense at the outset for many court reporters who are overburdened by the legal system. Court reporters would have no more protection under qualified immunity than they would if court reporters were afforded no immunity at all. The Ninth Circuit did not err in rejecting qualified immunity as the standard for court reporters.

CONCLUSION

For the reasons set forth in this Brief, Respondent Ruggenberg respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

28 U.S.C. § 753(b).

Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recordings or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic

sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

APPENDIX B

FRAP (10)(c).

(c) **Statement on the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable.** If no report of the evidence of proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

APPENDIX C

FRAP 11(b).

(b) **Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record.** Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the records and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical

exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

No. 91-7604

In The

Supreme Court of the United States

October Term, 1992

JEFFERY ANTOINE,

Petitioner,

vs.

BYERS & ANDERSON, INC., and
SHANNA RUGGENBERG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT BYERS & ANDERSON, INC.

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QUESTION PRESENTED

Does a court reporter practicing in federal district court enjoy absolute quasi-judicial immunity from civil liability?

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I. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioner's statement of facts relies, in large part, upon citations to documents that were not before the trial court when the trial court granted the Respondents' motion for summary judgment. These voluminous materials were the subject of a motion to strike which was granted by the Ninth Circuit. *See* August 27, 1991 Order, Appendix A. Respondent Byers & Anderson, Inc. objects to Petitioner's reliance, in his brief on the merits, upon documents that were not before the trial court when it made its decision on quasi-judicial immunity. Respondents had no opportunity to refute or place the factual allegations in context by supplementing the record with additional materials from the Petitioner's criminal trial docket. Respondent Byers & Anderson, Inc. therefore asks this Court to disregard the documents which were not before the trial court when it granted Respondents' motion for summary judgment based upon quasi-judicial immunity, namely JA 14, 20, 36, 38, 41, 43, 45.

Petitioner's allegation that the United States District Court for the Western District of Washington in Tacoma entered into a contract with Respondent Byers & Anderson, Inc. is an allegation disputed by Respondent Byers & Anderson, Inc. (*see* JA 8-13).

The original record before the trial court did not support Petitioner's allegation that "Ms. Ruggenberg repeatedly failed to provide the transcript, request an extension, communicate with counsel, comply with the

orders, or offer an explanation for her failure." Petitioner's Brief at 2-3.

The original record before the trial court did not support Petitioner's allegation that the "reconstructed transcript remained defective." Petitioner's Brief at 3.

Respondent Byers & Anderson, Inc. refutes Petitioner's conclusion that the Ninth Circuit relied upon the availability of a civil remedy in denying Antoine an acquittal based upon his delay in receiving a complete transcript. Petitioner's Brief at 3. The Ninth Circuit vacated Antoine's conviction and remanded to the district court to determine whether Antoine could show that his right to appeal was specifically prejudiced by his lack of a complete transcript. *United States v. Antoine*, 906 F.2d 1379, 1381, 1383-84 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 398 (1990). On remand, the trial court found that Antoine could show no specific prejudice resulting from the delay in his receipt of a complete transcript (JA 67). This conclusion that Antoine suffered no due process violation as a result of the delay in receiving a transcript was affirmed by the Ninth Circuit (JA 68). This Court denied certiorari at ___ U.S. ___, 113 S. Ct. 273 (October 5, 1992).

B. DECISIONS BELOW

Respondent Byers & Anderson, Inc. agrees with Petitioner's description of the decisions below. In addition, the Ninth Circuit Court of Appeals did not reach three issues that were the subject of a cross-appeal filed by Byers & Anderson, Inc. If this Court reverses the Ninth Circuit's affirmance of Respondent's dismissal based upon absolute quasi-judicial immunity, then Respondent Byers & Anderson, Inc. asks that this case be remanded to the Ninth Circuit for consideration of its cross-appeals which were held by the Ninth Circuit to be moot (JA 65).

II. SUMMARY OF ARGUMENT

Judicial immunity was designed to protect the judicial process, not the individual court officer. Consequently, absolute immunity attaches only to those functions which are essential to the central purpose of the judicial process, the efficient adjudication of claims.

Utilizing a functional analysis, this Court has held that judges are entitled to absolute immunity only when performing a "judicial function." Similarly, court personnel are entitled to absolute quasi-judicial immunity when performing a judicial function. It is the character of the function performed, rather than the title of the court officer, that determines whether or not judicial immunity attaches.

Court reporters perform a function that is vital to the efficient operation of the judicial process. But court reporters and other judicial offices must routinely interact with disgruntled litigants, many of whom will be dissatisfied with the disposition of their legal dispute. If these dissatisfied litigants were allowed to sue judges, court reporters, and other court personnel, this would interfere with the efficient operation of the judicial process. Court personnel would be distracted and diverted from their public duties, and judgments would be subject to collateral attack.

Forcing court reporters to defend themselves against claims by disgruntled litigants would negatively impact the judicial process and is not necessary. Courts have procedural mechanisms to discourage unreasonable delays, and litigants whose rights are truly prejudiced by an unreasonable delay in receiving a trial transcript may seek redress in the appellate courts.

Absolute immunity should apply to court reporters just as it does to judges, witnesses, jurors and prosecuting attorneys, for all perform functions which are integrally related to the central purpose of the judicial process, the adjudication of claims.

III. ARGUMENT

A. COURT REPORTING IS A JUDICIAL FUNCTION BECAUSE IT IS INTEGRALLY RELATED TO THE JUDICIAL PROCESS

In order for judicial immunity to attach under *Forrester v. White*, 484 U.S. 219 (1988), the actor must be performing a judicial function, and public policy must support immunity. *Forrester v. White*, 484 U.S. at 224. Petitioner and Respondent are in general agreement on the Court's legal standard for the application of absolute quasi-judicial immunity. The parties disagree, however, on how the court should determine whether a court reporter serves a "judicial function." Petitioner defines "judicial function" as a discretionary act, while Respondent Byers & Anderson, Inc. maintains that a "judicial function" is a function integrally related to the adjudicatory process.

1. Petitioner's Discretion Test Is Inapplicable.

Petitioner argues that a court reporter's duties are ministerial rather than discretionary[1], and therefore should not be protected by absolute immunity. Petitioner's Brief at 15-18. An analysis of whether Ruggenberg's court reporting duties were ministerial or discretionary has no bearing upon whether quasi-judicial immunity applies in this case. The appropriate question to analyze is whether Ruggenberg's court reporting duties were integrally related to the judicial process.

In applying a test of discretion, Petitioner confuses judicial immunity with executive immunity. Immunity for government employees outside of the judicial branch of government is an analogue of the doctrine of judicial immunity. Courts cannot draw lines between judicial and administrative conduct when determining whether a government employee in the executive branch is entitled to immunity. Rather, courts ask whether the government employee was exercising discretion, or acting as a decision-maker, in a way analogous to how the judiciary disposes of cases. *See Westfall v. Erwin*, 484 U.S. 292 (1988); *Saul v. Larsen*, 847 F.2d 573 (9th Cir. 1988). This is not, however, the test to be applied to a court reporter.

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[1] Neither Petitioner nor Amici Curiae on behalf of Petitioner, have any insight or expertise concerning how much discretion is involved in the performance of a court reporter's duties. For a closer look at the court reporter's function in the courtroom, Respondent refers the Court to the amicus brief submitted by the National Court Reporters Association.

Court reporter immunity is derived from *judicial*, not executive, immunity. Whether judicial immunity attaches to a given act does not depend on whether the act is discretionary, but whether it serves a judicial function. *See Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988). This Court in *Forrester v. White*, 484 U.S. 219, did not ask whether the defendant judge's discharge of a court employee was a discretionary act; obviously hiring and firing decisions involve the exercise of discretion. Rather, the court asked whether the conduct was *judicial*, and found that when the judge discharged a probation officer he was performing an administrative rather than judicial function. The question before this Court is not whether Ruggenberg's court reporting duties required the exercise of discretion, but rather whether they served a quasi-judicial function. *See Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988).

2. A Quasi-Judicial Function Is One Integrally Related To The Adjudicatory Process.

Petitioner asserts that judicial functions must be characterized by the "exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, and the declaration or alteration of individual rights and obligations." Petitioner's Brief at 14. Under Petitioner's narrow definition, absolute immunity in the judicial branch would be limited to judges, and judges would be absolutely immune only when making discretionary rulings.

The narrow definition urged by Petitioner ignores the purpose behind judicial and quasi-judicial immunity. Judicial immunity was designed, not to protect individual court officers, but to protect the judicial process. *Burns v. Reed*, 111 S.Ct. 1934, 1943 (1991).[2] Consequently, all major participants in the adjudicatory process enjoy absolute immunity. Judges enjoy absolute immunity for their actions which relate to the adjudicatory process. *See Forrester v. White*, 484 U.S. at 227; *Stump v. Sparkman*, 435 U.S. 349, 359, *rehearing denied*, 436 U.S. 951 (1978). The prosecuting attorney enjoys absolute immunity for actions taken while prosecuting the case. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Johnson v. Reno Police Chief*, 718 F.Supp. 36, 37 (D. Nev. 1989). Trial witnesses enjoy absolute immunity from civil liability.[3] *See Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983). Jurors enjoy absolute immunity from civil liability. *See White v. Hegerhorst*, 418 F.2d 894, 895 (9th Cir. 1969), *cert. denied*, 398 U.S. 912 (1970). Court clerks in many jurisdictions enjoy absolute immunity from civil liability. *Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992); *Mullis v. United States Bankruptcy Court, District of Nevada*, 828 F.2d 1385, 1390 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988); *Dieu v. Norton*, 411 F.2d 761, 763 (7th Cir. 1969); *Sullivan v. Kelleher*, 405 F.2d 486, 487

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[2] *See* Part III.B.2.b., *infra*.

[3] Surely a fact witness who is sworn to tell the truth should not be exercising discretion when responding to factual questions presented to him or her at trial. Still, witnesses enjoy absolute immunity for they are essential to the functioning of the adjudicatory process.

(1st Cir. 1968); *Zimmerman v. Spears*, 428 F.Supp. 759, 762 (W.D. Tex.), *aff'd*, 565 F.2d 310 (5th Cir. 1977).[4]

Similarly, many courts which have considered the issue have held that court reporters are protected from civil liability by absolute quasi-judicial immunity. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1476 (9th Cir. 1991), *cert. granted*, 113 S.Ct. 320 (1992); *Dellenbach v. Letsinger*, 889 F.2d 755, 763 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989); *Dieu v. Norton*, 411 F.2d at 763; *Thurston v. Robison*, 603 F.Supp. 336 (D. Nev. 1985).[5]

If Petitioner's narrow definition of a judicial or quasi-judicial function were adopted by the Court, then

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[4] *See also Gregory v. United States Bankruptcy Court for the District of Colorado*, 942 F.2d 1498 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2276 (1992) (bankruptcy trustee absolutely immune); *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989) (court personnel who incarcerated spectator found in contempt was entitled to absolute immunity); *Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987) (federal probation officers absolutely immune from claim he included false information in pre-sentencing report); *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir.), *cert. denied*, 484 U.S. 832 (1987) (court appointed psychiatrist absolutely immune); *Coverdell v. Department of Social and Health Services, State of Washington*, 834 F.2d 758, 764-65 (9th Cir. 1987) (court appointed CPS worker granted immunity); *Turner v. Barry*, 856 F.2d 1539, 1540 (D.C. Cir. 1988) (probation officer immune from claim of filing false presentence report).

[5] Those courts that have not applied absolute quasi-judicial immunity to court reporters have erroneously considered whether the court reporter's duties were "discretionary," rather than whether the court reporter performed a function integral to the judicial process. *See* Part III.A.1., *supra*.

witnesses would not enjoy absolute immunity, court clerks would not enjoy absolute immunity, court reporters would not enjoy absolute immunity, and judges would enjoy absolute immunity only when making a discretionary ruling. *See Foster v. Walsh*, 864 F.2d at 418 (judge's issue of arrest warrant was non-discretionary, but was a "truly judicial act" justifying the application of absolute immunity). Under Petitioner's narrow definition, absolute quasi-judicial immunity would be entirely eliminated, for no quasi-judicial officer makes binding and conclusive decisions that determine a legal issue or individuals' rights and obligations.

The purpose for absolute immunity in the judicial branch is to protect the judicial process. The Ninth Circuit below correctly recognized that the making of the official record of a court proceeding is "inextricably intertwined with the a ljudication of claims." *Antoine v. Byers & Anderson, Inc.*, 950 F.2d at 1476.[6] Similarly, the functions fulfilled by a judge in open court, a trial fact witness, a prosecuting attorney, and a juror, all are inextricably intertwined with the adjudicatory process. All of these actors enjoy absolute immunity when participating in the adjudicatory process.

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[6] Other courts have applied the "integral part of the judicial process" test to determine whether judicial immunity applies. *See Barr v. Matteo*, 360 U.S. 564, 569 (1959); *Boyer v. County of Washington*, 971 F.2d 100, 102 (8th Cir. 1992) (absolute immunity applied to court clerk); *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988); *Tripati v. U.S. Immigration & Naturalization Service*, 784 F.2d 345, 348 (10th Cir. 1986), *cert. denied*, 484 U.S. 1028 (1988); *Hughes v. Chesser*, 731 F.2d 1489, 1490 (11th Cir. 1984); *Sullivan v. Kelleher*, 405 F.2d 486, 487 (1st Cir. 1968).

Court reporters are also essential to the adjudicatory process and should continue to enjoy absolute quasi-judicial immunity. *See Dellenbach v. Letsinger,* 889 F.2d at 763; *Scruggs v. Moellering,* 870 F.2d at 377; *Thompson v. Duke,* 882 F.2d 1180 (7th Cir. 1989), *cert. denied,* 495 U.S. 929 (1990); *Mullis v. U.S. Bankruptcy Court For the District of Nevada,* 828 F.2d 1385 (9th Cir. 1987); *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969); *Dieu v. Norton,* 411 F.2d at 763; *Peckham v. Scanlon,* 241 F.2d 761, 763 (7th Cir. 1957).

3. An Historical Basis Exists For The Application Of Absolute Immunity To Court Reporters.

In deciding whether an official performing a particular function is entitled to absolute immunity, this Court has frequently looked for an historical or a common law basis for the immunity in question. *Mitchell v. Forsyth,* 472 U.S. 511, 521 (1985). Petitioner and Amici Curiae incorrectly argue that there is no historical basis for court reporter immunity. Although modern day court reporting did not exist at common law, the preparation and preservation of an official record has always been the responsibility of the court. The preparation of the official record remains a "judicial function" even though judges have delegated their notetaking responsibilities to court reporters. *See Dellenbach v. Letsinger,* 889 F.2d at 761.

Official court reporting began in this country during the 1860's. J. Haviland, "Philander Deming's Role," The Nat'l Law J. 15 (Apr. 12, 1982); O. Ratteray, "Verbatim Reporting Comes of Age," Judicature, Vol. 56, No. 9, page 368 (Apr. 1973). The idea of attempting to hold a court

reporter personally liable for a delay in receiving a transcript seems to be of recent creation. *See Waterman v. State of New York,* 232 N.Y.S.2d 22, 30 (1962), *aff'd in part, rev'd in part,* 241 N.Y.S.2d 314 (1963). (To allow these claims to prevail would open a whole new avenue of litigation in an area heretofore non-existent.)

The common law basis for immunity need not mirror current circumstances in order for immunity to apply. An immunity is considered to have a common law basis if an analogous immunity existed at common law. *See Burns v. Reed,* 111 S. Ct. at 1943. At common law, judges were responsible for taking notes during trial which were relied upon in the judicial process.

> When the procedure by motion for new trial developed in the eighteenth century the trial judge would supply a report based on his own notes, which might be substantial but incomplete, prepared to help him draft his own judgment, and taken down in longhand in most cases.

H.M. Scharf, "The Court Reporter," 10 J. Legal History 191, 197 (Sept. 1989); *see also* O. Ratteray, "Verbatim Reporting Comes of Age," Judicature, Vol. 56, No. 9, page 373 (Apr. 1973).

Judges are still ultimately responsible for preparation of the court record. Supervising the preparation of the record of trial, while a task ordinarily delegated to the court's officers and counsel, is clearly within the general responsibility of the court. *Dellenbach v. Letsinger,* 889 F.2d at 761. The Court Reporter Act requires that court proceedings be recorded verbatim "subject to regulations promulgated by the Judicial Conference and subject to

the discretion and approval of the judge." 28 U.S.C. § 753(b), in pertinent part. Judges now delegate the note-taking portion of their responsibilities to court reporters pursuant to the Court Reporter Act, but if the transcript is unavailable for some reason, judges may still rely upon their own notes in certifying a record to the appellate court. *See Waterman v. State of New York,* 232 N.Y.S.2d at 29.

When deciding whether absolute immunity applies in a given situation, this Court looks not to the title of the actor, but to the function being performed. *Forrester v. White,* 484 U.S. at 224. The modern day court reporter fulfills the same function as the common law judge who took notes to be used as a record for appeal. It is still the "function of the Judge to certify a proper record to the Appellate Court." *Waterman v. State of New York,* 232 N.Y.S.2d at 29. Judges are absolutely immune from civil liability for their preparation of the record for appeal. *See Dellenbach v. Letsinger,* 889 F.2d at 761. The functional approach of this Court does not justify affording court reporters less protection than judges from dissatisfied litigants' vexatious lawsuits. The court reporter has been delegated a function previously performed by judges under the protection of absolute judicial immunity. This provides the historical basis for applying absolute quasi-judicial immunity to court reporters.

B. PUBLIC POLICY FAVORS CONTINUED APPLICATION OF ABSOLUTE IMMUNITY TO COURT REPORTERS.

1. Court Reporter Immunity Supports The Finality Of Judgments.

The original purpose for the doctrine of judicial immunity was to discourage collateral attacks on court judgments, and thereby establish appellate procedures as the standard system for correcting judicial error. *Forrester v. White,* 484 U.S. at 225; J. Block, "*Stump v. Sparkman* and the History of Judicial Immunity," 1980 Duke L. Journal 879. Petitioner Antoine is attempting such a collateral attack in this case.

Petitioner asserts that the "only remedy" for his "now long-completed constitutional violation" is an action for damages. Petitioner's Brief at 8. In this civil case, Antoine seeks $2,000,000 and additional relief for his delay in receiving a transcript of his criminal trial which allegedly denied him of his constitutional right to due process (JA 4). The United States Constitution does not guarantee the right to a verbatim transcript of a criminal trial proceeding. Moreover, the Ninth Circuit Court of Appeals has already ruled that the delay in producing the transcript of Antoine's criminal trial did not deny Antoine of his constitutional right to due process (JA 68).

Antoine availed himself of the appropriate avenue for seeking redress for his delay in receiving the trial transcript. Antoine raised the unavailability of a completed transcript as an issue on appeal when he appealed his criminal conviction. *See United States v. Antoine,* 906

F.2d at 1381. The Ninth Circuit upheld the trial court's finding that the delay in the production of a completed transcript did not prejudice Antoine in his right to appeal and therefore did not violate his constitutional right to due process (JA 66).

Antoine should not be allowed to collaterally attack the Ninth Circuit's holding that his constitutional rights have not been violated, in the context of this civil action against the court reporter who recorded his criminal trial.

Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of appellate review, which are largely free of the harmful side-effects associated with exposing judges to personal liability. *Forrester v. White*, 484 U.S. at 227. Similarly, the appellate process allows litigants the opportunity to challenge the actions of other participants in the adjudicatory process.

> . . . the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.

Mitchell v. Forsyth, 472 U.S. at 522-23.

If the probation officer had not been allowed to sue the judge for wrongful discharge in *Forrester*, she would have had no other remedy. She was not damaged in the adjudicatory process, so she would have no right to appeal. Contrarily, litigants who are wronged in the adjudicatory process have the right to seek redress on appeal. This, coupled with the possibility of a high volume of vexatious lawsuits brought by disgruntled litigants, justifies continuing the application of absolute quasi-judicial immunity to court reporters.

The application of absolute quasi-judicial immunity to the court reporter and the court reporting firm in the case below did not infringe upon Antoine's constitutional rights. This has already been decided by the Ninth Circuit, and this Court did not grant certiorari on this issue (JA 66). If this case were remanded to the trial court, this Respondent would assert the defense of *res judicata*. Upholding absolute immunity for court reporters supports the finality of judgments.

2. Exposing Court Reporters To Civil Liability Would Negatively Impact The Judicial Process.

During recent years, budgeting constraints have sometimes forced trial courts to handle increased volumes of cases with an inadequate number of court reporters. *See* M. Fox, "Eastern District's Hours Cut Due to Federal Budgeting Law," Vol. 200, New York L. Journal, page 1, col. 1 (Nov. 2, 1988); R. Hanley, "U.S. Court Delayed by Reporter Shortage," Vol. 100, The Los Angeles Daily Journal, page B1, col. 1 (July 16, 1987); C. McHugh, "No Funds for State-Paid Court Reporters: Gulley," Vol. 130, Chicago Daily Law Bulletin, page 1, col. 5 (April 13, 1984). The published appellate decisions in which a litigant has sued a court reporter for the reporter's delay in producing a completed transcript usually involve a court reporter with a large backlog of transcription orders. *See, e.g., Holt v. Dunn*, 741 F.2d 169 (8th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981). Forcing court reporters to bear the brunt of this systemic problem by exposing them to

personal liability would negatively impact the judicial process.

a. The Threat Of Litigation Could Be Used To Unduly The Influence The Judicial Process.

One reason absolute immunity is extended to the judiciary is to eliminate any possibility that the threat of litigation may influence the judicial process. *See Bradley v. Fisher,* 80 U.S. (13 Wall) 335, 347 (1871). In fulfilling its function of dispensing justice, the judicial branch is expected to follow fair procedures that apply to all litigants. The elimination of absolute immunity could cause court reporters to provide preferential service to litigants who threaten litigation.

Petitioner's argument that court reporters exercise no discretion because they are required by statute to promptly transcribe a record of a proceeding upon the request of a party or a judge, is myopic and ignores the reality of transcript backlog. Faced with a significant backlog of ordered transcripts, the threat of civil litigation could cause a court reporter to produce a transcript for a disgruntled litigant who threatens the court reporter with a civil lawsuit before preparing transcripts ordered earlier by other litigants.

b. The Elimination Of Absolute Immunity For Court Reporters Would Interfere With The Functioning Of The Courts.

"Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated

with litigation." *Burns v. Reed,* 111 S. Ct. at 1943 (emphasis in original); *see Forrester v. White,* 484 U.S. at 226; *Mitchell v. Forsyth,* 472 U.S. 511, 521-22 (1985). The judicial process is an arena of open conflict, and it is inevitable that many of those who lose in trial will blame those associated with the court process. *Mitchell v. Forsyth,* 472 U.S. at 509-10; *Butz v. Economou,* 438 U.S. 478, 512 (1978). Judges are insulated from such vexatious litigation by absolute judicial immunity. *Forrester v. White,* 484 U.S. at 226. Similarly, other participants in the adjudicatory process have been clothed with absolute quasi-judicial immunity. *See* Part III.A.2., *supra.* Otherwise, judicial immunity would be an empty protection allowing harassments directed at the judge to proceed against other courtroom participants. *See Kincaid v. Vail,* 969 F.2d at 601; *Dellenbach v. Letsinger,* 889 F.2d at 763; *Scruggs v. Moellering,* 870 F.2d at 377; *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno,* 547 F.2d 1, 3 (1st Cir. 1976); *Lockhart v. Hoenstine,* 411 F.2d 455, 460 (3d Cir. 1969).

Despite these concerns expressed by the First, Third and Seventh circuits, the Petitioner maintains that there is no reason to believe that the elimination of absolute immunity for court reporters will result in unwarranted litigation. Petitioner's Brief at 22-23. In support of this argument, Petitioner engages in a statistical analysis based upon highly questionable methodology. *See* Petitioner's Brief at 23.

Petitioner concludes that the elimination of absolute immunity for court reporters will not result in an increase in litigation because relatively few appellate decisions have been published on court reporter immunity in the

Eighth and Second circuits since these two courts limited court reporter immunity. The number of published appellate decisions on court reporter immunity, however, bears no direct relationship to the number of lawsuits filed against court reporters in these two circuits. The Petitioner further ignores the logical consequence of this Court adopting his narrow definition of "judicial function" for the purpose of applying immunity; namely, the elimination of absolute immunity for all quasi-judicial officers. *See* Part III.B.4., *infra*.

If court reporter immunity is eliminated or limited, then court reporters will be required to defend themselves in civil lawsuits filed by disgruntled litigants. This would divert them from their duties. This policy reason supports the continuation of absolute immunity for court reporters. *See Imbler v. Pachtman*, 424 U.S. at 425 (prosecutor entitled to absolute immunity because responding to private litigation would divert energy and attention from enforcing the criminal law).

Obviously, the individual court reporter who is forced to defend against a negligence claim would be diverted from the reporter's responsibility to transcribe court proceedings, thus further contributing to the backlog of ordered transcripts. But the impact of exposing court reporters to civil liability would not be limited to the individual court reporter. Defending such a claim would require discovery directed at uncovering the reason for the backlog of ordered transcripts, and the normal turnaround time for transcripts prepared by other court reporters in similar positions. The percentage of a particular judge's decisions that are appealed would become a relevant subject of discovery. It is forseeable that in

defending a court reporter against a civil claim for damages allegedly resulting from the delay in receiving a completed transcript, that depositions would be taken of the individual court reporter, other court reporters in similar situations, the clerk of the court, and the judge who supervised the individual court reporter. Each of these parties could also be called to testify at the time of trial. Obviously, the impact on the judicial process if this were to occur would be negative and potentially great if such lawsuits became accepted. A reversal of the Ninth Circuit in the instant case would set a new national precedent which would invite the filing of such lawsuits throughout the country.

3. Exposing Court Reporting Firms To Civil Liability When They Are Assisting The Court In An Emergency Is Against Public Policy.

Amici curiae Scott argues that even if absolute immunity applies to court reporter Ruggenberg, a different standard should apply to Byers & Anderson, Inc. Amici brief at 20-34. This issue is not before the Court and the Scotts' civil state court action is not before the Court.[7] Nevertheless, public policy does not favor imposing liability on a private court reporting firm supplying a trial court with a court reporter in an emergency.

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[7] The Scotts' amici curiae brief should be stricken because it is not written on the record before the Court and because it addresses an issue that was not raised by Petitioner in his petition for certiorari. *See* Respondent's Objection to Motions for Leave to File Briefs of Amici Curiae at 1-3.

Federal courts are statutorily authorized to hire temporary court reporters on an emergency basis. *See* 28 U.S.C. § 753(g). These court reporters are essentially temporary employees of the federal district court. They perform the same functions as the court's regular reporters, only on a short term basis. Exposing a court reporting firm to liability for supplying a federal court with a reporter on an emergency basis would be unfair and against public policy.

If court reporting firms were required to defend against litigation stemming from temporary court reporters' delays in producing transcripts, the associated discovery and trial processes would disrupt the judicial process in the same way that requiring individual court reporters to respond to civil litigation would. *See* Part III.B.2., *supra*. An additional inequity would result under amici curiae's scenario, however. The court reporting firm that supplies a court reporter to a court on an emergency basis could potentially be found civilly liable for the actions of an individual court reporter even though the court reporting firm had no control over the behavior of the individual court reporter while he or she was working for the federal court.[8] Additionally, although the court reporting firm could potentially be found liable, it would have no right of indemnity against

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[8] The principals of Byers & Anderson, Inc. did not know that Ruggenberg had been assigned to report the Antoine trial, and they certainly had no control over the performance of Ruggenberg's duties while she was temporarily employed by the federal district court (JA 8-10 and 12-13). This "control" issue is relevant to Respondent's cross-appeal which was held to be moot by the Ninth Circuit.

the individual court reporter or the court because both would be immune. The prospect of this serious inequity could make private court reporting firms reluctant to voluntarily supply a court reporter to a federal district court in an emergency situation, which would also negatively impact the judicial process.

In *Stump v. Sparkman*, 435 U.S. 349, *rehearing denied*, 436 U.S. 951 (1978), this Court held that the application of judicial immunity depends, in part, upon the expectations of the parties. The litigants who come before a federal trial court have no different expectation of a court reporter who is a permanent employee of the court, than they do of a court reporter who is a temporary employee of the court provided by a private court reporting firm. To hold that a litigant has a cause of action in one circumstance and not the other would be to promote form over substance contrary to the functional approach set forth in *Forrester v. White*, 484 U.S. at 224.

4. Limiting Court Reporter Immunity Would Be Unfair And Would Logically Lead To The Erosion Of Other Immunities.

Petitioner argues that the scope of this case is very narrow. Petitioner's Brief at 7. The position urged by Petitioner, however, would essentially eliminate absolute quasi-judicial immunity or, if limited to the facts of this case, would result in an unfair and inconsistent application of the immunity doctrine to court reporters contrary to this Court's functional approach.

If this Court adopts Petitioner's discretionary versus ministerial test for the application of judicial or quasi-

judicial immunity, this would expose not only court reporters, but all court personnel to potential expanded liability. The Fifth Circuit which has adopted Petitioner's discretionary versus ministerial test has denied absolute immunity to court clerks as well as court reporters. *See Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980).

Adoption of Petitioner's definition of a judicial act would effectively eliminate absolute immunity for all quasi-judicial officers. No quasi-judicial officer possesses the authority to make ultimate discretionary decisions on issues before the court and consequently, no quasi-judicial officer would qualify for absolute immunity under Petitioner's narrow definition. *See* Petitioner's Brief at 14.

It is even unclear what impact adoption of the Petitioner's urged position might have on the absolute immunity of judges. For example, would a judge become potentially liable for issuing an arrest warrant? *See Foster v. Walsh*, 864 F.2d at 418 (judge's issuance of arrest warrant was *non-discretionary*, but was a "truly judicial act" justifying the application of absolute immunity). Could a judge be liable for the entry of a stipulated order? Would a judge be immune from liability for hiring an insufficient number of court reporters, while at the same time the individual court reporters could be held liable for their inability to promptly produce transcripts due to this insufficient hiring? *See Rheuark v. Shaw*, 628 F.2d at 304. In *Rheuark*, the fifth Circuit held that a judge was absolutely immune from civil liability for his alleged failure to appoint a sufficient number of court reporters to alleviate the backlog of transcripts ordered in his court, yet the court reporter was granted only qualified immunity. 628 F.2d at 304. This result is consistent with the discretionary

versus ministerial test urged by Petitioner but could lead to the inequitable result of a court's insulation from liability for inadequate hiring, while the court's employee could be held personally liable for the logical result of this inadequate hiring. This result would not only be inequitable, it is contrary to this Court's opinion in *Forrester v. White, supra*, which suggests that hiring and firing decisions are administrative rather than judicial acts and consequently are not protected by absolute judicial immunity.

5. Other Checks Exist To Prevent Court Reporter Abuses

Necessarily, immunity may protect some individuals who act with improper motives. *See, e.g., New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1301-02 (9th Cir. 1989) (malice or corrupt motive in the performance of judicial tasks is insufficient to deprive a judge of absolute immunity). This does not mean that the judicial system is powerless to address such abuses. Petitioner incorrectly asserts that no "checks" exist to prevent court reporter abuses. Petitioner's Brief at 21-22. The courts have numerous mechanisms to control court reporter behavior.

A court reporter works under the direct supervision of the court. *See* 28 U.S.C. § 753(c). If a court reporter unreasonably delays the production of a transcript, a judge may impose sanctions on the court reporter (which occurred in this case) or remove the court reporter from his or her position. *See* T. Sullivan, "Court Reporter Fined

for Late Transcripts," Vol. 135, Chicago Daily Law Bulletin, page 1, col. 2 (Nov. 8, 1989); K.F. Millhouse, "Court Reporters Required to Diligently Comply With Deadlines for Transcript Preparation: *In Re Watson*," Vol 13, Pepperdine L. Rev. 543-44 (Jan. 1986); *see also*, M. Tapp, "Delays Charged In Bankruptcy Appeals," vol. 131, Chicago Daily Law Bulletin, page 1, col. 5 (July 12, 1985). A judge can find a court reporter in contempt of court or mandate a reduced fee schedule for transcripts that are produced late.

Most officials who are entitled to absolute immunity from civil liability are subject to other checks that help prevent abuses of authority from going unredressed. *Mitchell v. Forsyth*, 472 U.S. at 522. The existence of such safeguards against improper performance is a characteristic of tasks which are "integrally related to the judicial process." *Dorman v. Higgins*, 821 F.2d 133, 136 (2d Cir. 1987). The numerous mechanisms available to the court to control a court reporter's unreasonable delay in producing a transcript, coupled with a litigant's ability to seek redress through the appellate process, favors the retention of absolute immunity for court reporters.

C. QUALIFIED IMMUNITY WOULD NOT ADEQUATELY PROTECT THE JUDICIAL PROCESS.

Petitioner's argument that qualified immunity adequately protects the interests of court reporters misconstrues the purpose of judicial immunity. *See* Petitioner's Brief at 31-34. Judicial immunity was not designed to protect individual court officials. Judicial and

quasi-judicial immunities were designed to protect the *judicial process*. *Burns v. Reed*, 111 S.Ct. at 1943. Petitioner's argument that qualified immunity will protect all but the incompetent or malicious ignores the impact that forcing court reporters to respond to civil litigation will likely have on the judicial process.

The opinions of this Court recognize the important procedural difference between the application of absolute and qualified immunity.

> An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. . . .
>
> "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Imbler v. Pachtman, 424 U.S. at 419, n. 13 and 14, quoting *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). At least one court that has limited court reporter immunity has held that the dismissal of an action on the basis of immunity is proper only when an official is absolutely immune, and not when the official is qualifiedly immune. *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980).

This Court has never limited the immunity of a judicial official who was performing a function integrally

related to the adjudicatory process. The purposes of judicial immunity – to promote finality of judgment, to protect the judicial process from the burden of vexatious lawsuits, to prevent undue influence on the judicial process – cannot be fulfilled by the application of qualified immunity. The negative impact that litigation would have on the court process would not depend upon the outcome of the lawsuits. The harm is created by the potential exposure to liability, which would require court personnel to become embroiled in litigation.

It is anticipated that Petitioner will argue that the protection of qualified immunity is stronger since this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, presidential aides appealed the lower court's decision that they were not entitled to absolute immunity. In response to concern about the subjective nature of the "good faith" test for the application of qualified immunity, this Court held in *Harlow* that a court may determine by summary judgment that the law at the time the action occurred was not clearly established and consequently dismiss the case. *See Harlow v. Fitzgerald*, 457 U.S. at 818.

Harlow v. Fitzgerald, supra, has no application to this case. *Harlow* involved *executive*, not judicial, immunity. Consistent with long-standing precedent, the opinion in *Harlow* reiterated that *judicial* functions "require *absolute* immunity." 457 U.S. at 811 (emphasis added).

Even if this court were to attempt to apply the semi-objective test set forth in *Harlow* to court reporters, this would not adequately protect the judicial process. The statutes and procedural rules governing the production

of trial transcripts are not unclear. For example, the Ninth Circuit local rules require a court reporter to "begin preparation of the transcript as soon as a Transcript Order Form is filed in the district court and is received by the court reporter." Ninth Circuit R. App. P. 10-3.2(e). If the law is clearly established, then the qualified immunity defense fails under *Harlow*. 457 U.S. at 818. The problem faced in the case below, and most other cases involving trial transcript delay, does not stem from the court reporter's ignorance of the statutes and procedural rules. The problem is the overburdened system which makes strict adherence to the time requirements set forth in the statutes and procedural rules, at times, impossible. Even the Fifth Circuit, which affords court reporters only qualified immunity, has recognized that it "cannot charge the court reporter with responsibility for the harm suffered by appellee since he could do the work of only one person." *Rheuark v. Shaw*, 628 F.2d at 305, n.13.

IV. CONCLUSION

Court reporters perform a "judicial function" in federal court and are entitled to the same absolute immunity afforded other participants in the adjudicatory process. The Ninth Circuit should be affirmed.

DATED this 30th day of December, 1992.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY ANTOINE, Plaintiff/Appellant, vs. BYERS & ANDERSON, INC., SHANNA RUGGENBERG, Defendants/Appellees.	NO. 90-35293 90-35362/63 DC# CV-88-260-RJB ORDER

In response to appellee's motion to strike portions of appellant's brief and exhibits, the parties should be advised that the court will consider the record as it was before the court when it ruled on the motion for summary judgment (no more or no less).

FOR THE COURT,

CATHY A. CATTERSON
CLERK OF COURT

Gwendolyn Baptiste
Deputy Clerk

No. 91-7604

In The

Supreme Court of the United States

October Term, 1992

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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Absolute immunity is the exception, not the rule, and should be granted only where necessary to preserve independent and impartial judgment. Neither historical precedent nor public policy supports a departure from this principle in the case of court reporters.

Respondents offer no persuasive reason why qualified immunity cannot adequately protect court reporters from vexatious suits just as it protects thousands of government officials and employees, from Cabinet members to governors and police officers. Nor do Respondents explain why court reporters, in comparison with Cabinet members and the like, have some unique susceptibility to vexatious litigation that warrants extending absolute immunity to cover transcript production. For these reasons, and because the purpose of absolute immunity is not served by according such protection to court reporters, the decision of the Ninth Circuit Court of Appeals should be reversed.[1]

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[1] Respondent Byers & Anderson's contention that Petitioner's Statement of Facts contains allegations not properly before this Court ignores that the recitations were taken from the decision of the Ninth Circuit Court of Appeals that is before this Court for review. *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1472 (9th Cir. 1991) (JA 51-54). Moreover, the posture of this case does not require the Court to make any judgment as to whether Petitioner's alleged facts are true; the Court is asked to decide only whether the defense of absolute immunity should preclude Petitioner from recovery *if* the alleged facts are true.

I. ABSOLUTE IMMUNITY DERIVES FROM FUNCTION, NOT FROM CONNECTION WITH "THE JUDICIAL PROCESS"

Respondents argue that absolute immunity is appropriate for court reporters because they perform "a function integrally related to the adjudicatory process." *See* Byers & Anderson Brief at 4.[2] Respondents reason that the purpose of absolute judicial immunity is to further the "efficient adjudication of claims," and therefore any function contributing to such adjudication must be insulated from all threat of liability. Hence, according to Respondents, this Court's functional approach resolves the absolute judicial immunity question by asking simply: (1) whether the court reporter's duties "are integrally related to the judicial process" and (2) whether public policy and the need for an "efficient" judicial system favor absolute immunity. Under Respondents' analysis, whether a court reporter's duties require adjudicatory or discretionary acts is irrelevant. Byers & Anderson Brief at 3-4.

Respondents' construction of the absolute immunity doctrine is incorrect for at least three reasons. First, neither the early common law nor this Court has ever recognized a blanket of absolute immunity covering all persons involved in the judicial process. For generations, literally hundreds of thousands of people have been integral participants in our nation's court system without the

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[2] The Brief of Respondent Byers & Anderson, Inc. is referred to as "Byers & Anderson Brief."

benefit of absolute immunity, and their exposure to liability has not obstructed the judicial process. Plaintiffs and defendants in civil suits have always been open to malicious prosecution and abuse of process claims; attorneys – including court-appointed public defenders – have long been subject to malpractice claims.[3] Even private law firms hired by state and federal agencies to conduct government litigation have done so for decades without any promise of absolute immunity. Respondents' "related to the judicial process" test inverts the presumption governing immunity: liability or qualified immunity is the rule; absolute immunity, the exception.

Second, "efficiency" has never been the primary purpose behind grants of absolute immunity; the overriding purpose is to insulate government officials and others from threats of liability that could deflect them from the proper execution of their official obligations. *Westfall v. Erwin*, 484 U.S. 292, 295 (1988).

> Judicial immunity arose because it was in the public interest to have judges who were at

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[3] Although public defenders and other court-appointed counsel may not be subject to *Bivens* and § 1983 actions, *see Polk County v. Dodson*, 454 U.S. 312 (1981), they still are subject to liability for malpractice. *Id.* at 325. This Court has analyzed immunity under state tort law claims in the same manner that it has analyzed immunity for constitutional violations. *See Westfall v. Erwin*, 484 U.S. 292 (1988). Witness immunity, in fact, is immunity from state defamation suit. *See* section I.B.2, *infra*.

In the instant case, Petitioner raised not only a *Bivens* claim but also tort and contract claims. However, the petition before this Court involves only the dismissal of Mr. Antoine's constitutional claims; the state law claims were dismissed by the district court without prejudice, for jurisdictional reasons. (JA 30)

> liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.

Dennis v. Sparks, 449 U.S. 24, 31 (1980). *See also Pierson v. Ray*, 386 U.S. 547, 554 (1967). In contrast, judges making employment decisions enjoy, at most, qualified immunity, despite the distraction and time demands that vexatious discrimination suits can pose and the resulting drain on judicial efficiency; the danger of judges being improperly influenced by the threat of such suits is not sufficiently great to warrant absolute immunity. *Forrester v. White*, 484 U.S. 219 (1988). Indeed, if judicial efficiency were of paramount importance, Congress would have provided the courts with a wholesale exemption from Section 1983 actions.[4]

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[4] While freeing officials from the time demands of litigation is one of the policy reasons that supports the grant of absolute immunity in certain situations, this concern has never been the basis for according immunity in the first instance. *See Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976).

For example, the Court has rejected the argument that absolute immunity is necessary to protect judges from testifying in third-party actions.

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties; and, if cases such as this survive initial challenges and go to trial, the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability.

Dennis, 449 U.S. at 30-31.

Finally, the idea that absolute immunity is conferred upon anyone who participates integrally in the judicial process, regardless of function, misconstrues this Court's functional analysis. That analysis looks at the need for breathing room in exercising judgment, not the need for removing exposure to liability generally. *Dennis*, 449 U.S. at 31. Respondents fail to demonstrate how a court reporter's production of a transcript is analogous to, or on a par with, the exercise of judgment historically accorded absolute immunity. Respondents also fail to demonstrate why court reporters face a unique threat of frivolous litigation that might justify extending absolute immunity to transcript production – or why they face any threat greater than that faced daily by thousands of police officers, FBI agents, and others, who perform their jobs with benefit of only qualified immunity.

A. RESPONDENTS' "RELATED TO THE JUDICIAL PROCESS" ANALYSIS CONVERTS ABSOLUTE IMMUNITY FROM THE EXCEPTION INTO THE RULE

The notion that the judicial process is so sacrosanct that all participants must be absolutely immune from civil liability is contrary to this Court's underlying approach to absolute immunity questions.[5] Absolute

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[5] Respondents' sweeping approach to absolute immunity is at odds with precedent, which rejects "a fixed, invariable rule of immunity [and instead] has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

immunity has always been granted cautiously and sparingly. *Hafer v. Melo*, 112 S. Ct. 358, 363 (1991); *Forrester*, 484 U.S. at 224. The presumption is against absolute immunity, and "the burden is on the official claiming immunity to demonstrate his entitlement." *Dennis*, 449 U.S. at 29.[6]

Nowhere in the Court's teaching does immunity derive from "connection" to a process. Nowhere in the common law or this Court's decisions does immunity absolutely insulate auxiliary court personnel – be they clerks, bailiffs, court reporters, docketing clerks, courtroom marshals, or guards – simply because their participation is important to the efficient administration of justice. Even the police officer presenting a probable cause affidavit to the court is not absolutely immune. *Malley v. Briggs*, 475 U.S. 335 (1986).

B. FUNCTIONAL ANALYSIS SERVES THE PRIMARY PURPOSE OF ABSOLUTE IMMUNITY: TO INSULATE GOVERNMENT OFFICIALS FROM IMPROPER INFLUENCES, NOT TO FOSTER EFFICIENCY

1. The Purpose of Absolute Immunity Is to Protect the Fearless Performance of Duty

The primary purpose of absolute immunity is to protect government processes from improper influences.

[6] Even officials who are granted absolute immunity in one context must justify the need for it in another. Thus, although prosecutors are absolutely immune for their selection of evidence, they receive only qualified immunity in supervising police investigations. *Burns v. Reed*, 111 S. Ct. 1934, 1943-44 (1991).

Westfall, 484 U.S. at 295. Adjudication, for example, should be on the merits, without concern about possible retaliation by the losing party against the adjudicator. *Pierson*, 386 U.S. at 554. Absolute immunity has been deemed necessary to shield judges' independence and impartiality from such concerns. *Id.*; *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

> If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.

Forrester, 484 U.S. at 226-27.[7]

The justification for absolute prosecutorial immunity is no different.

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring

[7] Respondents contend that a purpose of absolute judicial immunity is to prevent collateral attacks on judgments and thereby ensure the finality of judgments. However, Petitioner's civil action against Respondents will have no bearing upon his criminal conviction. Moreover, Respondents misconstrue the finality-of-judgments principle. That principle guards against the continued reevaluation of cases on the merits, which would occur if collateral courts entertained claims against judges based on their court decisions. Such claims in essence cause a retrial of the original decisions, by putting at issue the merits of those decisions. *See* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 886 n.38.

Further, the collateral-attack principle never has barred all collateral suits against participants in the judicial process. Police officers applying to the court for warrants, for example, are subject to civil suit despite the fact that such suits are collateral to criminal proceedings. *E.g.*, *Malley*, 475 U.S. at 343.

> and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences and terms of his own potential liability in a suit for damages.

Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976).

However, absolute immunity is not accorded to any official simply because of some danger that the official might be swayed from impartial and independent performance of his or her duties; that danger must be " 'very great.' " *Forrester*, 484 U.S. at 230 (citation omitted). Hence, a function protected by absolute immunity must entail special and broad discretion and, in addition, expose the official to a "very great" threat of vexatious suits.

2. The "Judicial Function" Inquiry Focuses on the Type of Conduct, Not Its Relationship to "the Judicial Process"

Because the primary purpose of absolute immunity is to preserve the impartiality of government action, the Court has adopted a functional test for determining whether to grant absolute immunity for any given government act: where the act involves adjudication or analogous weighing and evaluating, then absolute immunity may be appropriate.

> The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from . . . liability without regard to whether the alleged tortious conduct is discretionary in nature. *When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct.* It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government."

Westfall, 484 U.S. at 296-97 (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1957)) (emphasis supplied).[8]

The judicial functions that are protected, hence, are those entailing either adjudication or decisionmaking akin to adjudication. It is for this reason that jurors[9] and prosecutors enjoy absolute immunity.

> It is the functional comparability of *their judgments* to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well.

Imbler, 424 U.S. at 423 n.20 (emphasis supplied).

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[8] While decisionmaking or discretion is not sufficient to warrant absolute immunity for a particular function, *see Forrester*, 484 U.S. at 230, it is necessary. *Westfall*, 484 U.S. at 297 ("Because it would not further effective governance, absolute immunity for non-discretionary functions finds no support in the traditional justification for official immunity."); *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982); *Ex Parte Virginia*, 100 U.S. 339 (1880). By asking the Court to allow absolute immunity for the nondiscretionary task of producing a completed transcript, Respondents are *sub silentio* asking the Court to overrule these cases.

[9] Absolute immunity for jurors, a centuries-old principle, reflects the need to preserve the jury's independence not only from parties but also from judges. *See Bushell's Case*, 124 Eng. Rep. 1006, 1010-11 (1670).

In addition to judges and jurors making adjudicative decisions and prosecutors making prosecutorial decisions, *see Malley*, 475 U.S. at 343, the only other participants in "the judicial process" who have been accorded absolute immunity by this Court are witnesses.[10] Contrary to Respondents' assertion, testifying is a highly discretionary act, easily susceptible to improper influences.

> A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. . . . A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.

Briscoe v. LaHue, 460 U.S. 325, 333 (1983) (citation omitted).

Amicus Curiae National Court Reporters Association's contention that transcript production is not a mere mechanical task but requires substantial decisionmaking

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[10] Witness immunity, like immunity for judges, has deep common law roots. *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). Its purpose was and is to protect against the threat of defamation suits by disgruntled, nonprevailing parties. *Id.* at 332-33. Witnesses require absolute immunity so the public may be confident they are testifying freely and truthfully, according to their consciences, without fear of retribution. *Id.* at 333-34.

and discretion, Brief of Amicus Curiae National Court Reporters Association ("Court Reporter Brief") at 13-14, misses the point. Some modicum of decisionmaking does not transform an act into a discretionary function; virtually every act entails some choice. *Westfall*, 484 U.S. at 298. Producing a transcript entails no significant weighing and evaluating; two reporters transcribing the same proceeding should produce substantially and substantively identical transcripts. The Association's examples of court reporter discretion – "translating the notes taken during trial into a comprehensive written record" and "insertion of the correct punctuation to reflect the meaning of the speaker," Court Reporter Brief at 14 – hardly reflect the broad range of discretion exercised by judges, prosecutors, jurors, and witnesses. *Cf. Butz v. Economou*, 438 U.S. 478, 513 (1978) (administrative hearing examiner entitled to absolute immunity because examiner "may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions"). Certainly governors and the Attorney General face far more complex decisions on a daily basis, again, with only qualified immunity.

II. POLICY CONSIDERATIONS FAVOR, AT BEST, QUALIFIED IMMUNITY FOR COURT REPORTERS

Respondents argue that policy reasons dictate the need to extend absolute immunity to court reporters and that qualified immunity is not sufficient to protect them from vexatious litigation. However, none of Respondents' objections to qualified immunity withstand scrutiny.

A. QUALIFIED IMMUNITY HAS WORKED FOR VIRTUALLY ALL GOVERNMENT FUNCTIONS

The short list of functions for which absolute immunity consistently attaches makes it clear that the function must occupy a unique position in government processes:

1. Judges making judicial or legislative decisions, *see Pierson*, 386 U.S. 547; *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 734 (1980);
2. Jurors deciding cases, *see Imbler*, 424 U.S. at 422-23;
3. Prosecutors making indictment and trial strategy decisions, *see id.* at 427;
4. Agency officials acting as judges or prosecutors in administrative hearings, *see Butz*, 438 U.S. 478;
5. Witnesses, *see Briscoe*, 460 U.S. 325;
6. The President, *see Nixon v. Fitzgerald*, 457 U.S. 731 (1982); and
7. Legislators and their aides, the latter only for certain acts, *see Tenney v. Brandhove*, 341 U.S. 367 (1951).

In contrast, even an abbreviated list of functions for which qualified immunity is the rule makes it apparent that the umbrella of qualified immunity provides adequate shelter for almost all government conduct:

1. Judges making employment and administrative decisions, *see Forrester*, 484 U.S. 219;
2. Prosecutors advising police officers, *see Burns*, 111 S. Ct. 1934;

3. Governors, *see Scheuer v. Rhodes*, 416 U.S. 232 (1974);
4. Officers and members of the National Guard, *see id.*;
5. Presidents of state universities, *see id.*;
6. Cabinet members, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985);
7. Police officers doing investigative and enforcement work, *see Malley*, 475 U.S. 335; *Pierson*, 386 U.S. 547;
8. Senior aides to the President, *see Harlow*, 457 U.S. 800;
9. Law enforcement officers presenting probable cause affidavits to the court, *see Malley*, 475 U.S. 335;
10. Lower level federal officials and employees, *see Westfall*, 484 U.S. 292; and
11. School board members, *see Wood v. Strickland*, 420 U.S. 308 (1975).

Respondents' argument that judicial immunity is a vastly different creature from executive and legislative immunity and that comparisons are inappropriate has been soundly rejected by this Court. *Imbler*, 424 U.S. at 420-21. Although each branch of government may raise differing considerations, the general principles underlying immunity are the same. *Id.*; *Butz*, 438 U.S. at 510. Moreover, the branch of government does not dictate the form of immunity. Executive officials can enjoy "judicial" immunity, *see Butz*, 438 U.S. at 512-14, and judicial officials can enjoy legislative immunity, *see Consumers Union*, 446 U.S. at 734. Function, not title, is determinative.

That hundreds of thousands of government officials and employees can perform their official responsibilities with the protection of only qualified immunity suggests court reporters can do the same. Qualified immunity is sufficient to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

B. QUALIFIED IMMUNITY HAS NOT RESULTED IN A FLOOD OF COURT REPORTER LITIGATION

Respondents offer no evidence that qualified immunity for court reporters will open the floodgates of litigation. Qualified immunity is the majority rule – adopted by the Second, Third, Fifth, Sixth, Eighth, and Eleventh Circuits – whereas absolute immunity has been recognized in only the Seventh and Ninth Circuits. *See* Brief of Petitioner at note 30. Yet there is no evidence that court reporters in the qualified immunity circuits are bedeviled by vexatious suits.[11] Statistics for the Second and Eighth Circuits in fact indicate court reporter lawsuits are scarce. *See* Brief of Petitioner at 22-24.[12]

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[11] The National Court Reporters Association, surely in a position to know, fails to cite any source documenting concerns with the volume of litigation in those circuits with qualified immunity.

[12] Respondent Byers & Anderson criticizes Petitioner's statistics for including only appellate data, Byers & Anderson Brief at 17-18; however, the cited statistics include both appellate and district court filings and opinions.

In addition, it defies common sense to suggest that court reporters are as likely as judges, prosecutors, witnesses, and jurors to attract the animosity of disgruntled litigants. Those charged with prosecuting, testifying, and judging face a greater risk of suit because they play key roles in determining guilt or liability. *See Bradley*, 80 U.S. at 348. Court reporters play no such role. Nor is it plausible to assume that every typographical error or inaccuracy in a transcript will lead to a lawsuit. Most such errors are obvious to the reader, are harmless, and cause no alteration in the substance of what is being transcribed. Furthermore, the parties have the option of having the transcript corrected. Court reporters thus are likely to attract the ire of litigants not for the way in which they transcribe but only for their refusal or absolute failure to transcribe.[13]

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[13] Respondents argue that depriving court reporters of absolute immunity will cause a substantial increase in the amount of litigation against not only reporters but also other auxiliary court personnel, such as clerks. However, as discussed above in section I.A, any decision from this Court about court reporter immunity cannot be extrapolated to other court personnel performing other functions. What may be true for the court reporter may not hold true for the clerk, and vice versa. Moreover, clerks had no absolute immunity at common law, *see Bates v. Foree*, 67 Ky. (4 Bush) 430 (1868).

Respondents cite *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988), to argue that absolute immunity is necessary for court personnel generally. In *Foster*, a bench warrant was mistakenly issued for a motorist who had previously paid his fine, and the motorist sued the clerk. Qualified immunity would have provided sufficient protection; presumably the clerk issued the warrant based on information available at the time and consequently violated no "clearly established . . . rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Simple

C. QUALIFIED IMMUNITY ALLOWS FOR EARLY DISMISSAL OF INSUBSTANTIAL CLAIMS

Respondents also offer no basis for concluding that qualified immunity is unworkable or that most cases against court reporters will contain triable issues. Again and again, the Court has articulated the advantages of its qualified immunity standard, first formulated in *Harlow v. Fitzgerald*, which permits early dismissal of baseless claims. *Malley*, 475 U.S. at 341. *See Wyatt v. Cole*, 112 S. Ct. 1827 (1992) (Kennedy, J. & Scalia, J., concurring); *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991); *Anderson v. Creighton*, 483 U.S. 635 (1987). That standard focuses on whether the official reasonably could have believed that his or her conduct was lawful.

Respondents' complaint that qualified immunity will not protect court reporters from lawsuits over minor delays in transcript production thus is without merit. Reporters may apply to the court for extensions of time or seek the parties' consent to delays; when court approval or consent is granted, court reporters should have every reason to believe their conduct is lawful.[14]

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affidavits describing the computer error or other innocent clerical mistake would suffice for early dismissal of such a lawsuit on motion.

Nor is there any question that the judge issuing the show cause order that led to the warrant in *Foster* is absolutely immune. *Stump v. Sparkman*, 435 U.S. 349 (1978).

[14] Fed. R. App. P. 10(b) provides a simple mechanism of relief for court reporters who cannot meet deadlines – they may request an extension. And, as this case makes crystal clear, even court orders and sanctions may be inadequate. Surely judicial efficiency is better served by a rule requiring court reporters to request extensions rather than a rule whereby the aggrieved party's only remedy is litigating the issue through an appeal.

Attorneys and litigants have always worked within such time constraints.

D. ABSENT SUITS FOR DAMAGES, VICTIMS OF CONSTITUTIONAL VIOLATIONS BY COURT REPORTERS HAVE NO ALTERNATIVE REMEDIES FOR COMPENSATION

The existence of alternative remedies has never been determinative of absolute immunity.[15] For Petitioner, there has been no remedy. His action against Respondents is his only avenue of "compensation [for] past abuses." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).[16]

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[15] In some cases, the Court has applied absolute immunity in the absence of alternative remedies. *E.g., Dennis*, 449 U.S. 24 (plaintiff had no remedy other than damages for alleged battery); *Stump*, 435 U.S. 349 (plaintiff had no remedy other than damages against judge who issued sterilization order). In other cases, the Court has denied absolute immunity although alternative remedies are available. Thus, police officers receive only qualified immunity for Fourth Amendment violations, despite the alternative remedy of suppression of evidence. *See Pierson*, 386 U.S. at 547. *See also Burns*, 111 S. Ct. 1934 (prosecutor denied absolute immunity for advice to police despite remedy of suppression of confession).

[16] "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, 445 U.S. at 651. The Court's longstanding reluctance to extend absolute immunity beyond functions that require special protection arises from its recognition of the importance of a damages remedy to protecting con-

The availability of a reconstructed transcript, for example, does not compensate for all damages caused by derailed appeals.[17] And, in criminal proceedings, courts are extremely reluctant to reverse convictions because of an incomplete transcript or the delay in its production. *See, e.g., United States v. Antoine*, 906 F.2d 1379 (9th Cir.), *cert. denied*, 111 S. Ct. 398 (1990).[18] In the civil context,

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stitutional rights. *Harlow*, 457 U.S. at 807; *Butz*, 438 U.S. at 504-06.

[17] Nothing suggests that Fed. R. App. P. 10(c), which provides for reconstructed transcripts, was directed at either deterring court reporter misconduct or serving as an alternative remedy to damages. Prior to adoption of the Federal Rules of Appellate Procedure, Rule 10(c) was contained in Rule 75(n) of the Federal Rules of Civil Procedure. Rule 75(n) was intended to provide "a method whereby a record may be prepared in the perhaps rare case where there is no reporter present at all and no stenographic report is made of the proceedings" and to be "helpful as supplemental safeguards to prevent injustice in unusual cases." REPORT OF THE ADVISORY COMMITTEE, 5 F.R.D. 433, 490 (1946).

[18] Respondents also raise a *res judicata* argument, contending that Petitioner's claim of constitutional violations has already been rejected by the Ninth Circuit, precluding his raising it through a *Bivens* action. However, Respondents' *res judicata* argument was not raised in the courts below and is not before this Court now.

In any event, Respondents wrongly assume that Petitioner's claims in his civil suit are identical to the claims raised in the criminal proceeding. The Ninth Circuit's due process rulings were limited to issues of prejudice in his conviction; constitutional violations relating to, as one example, equal protection in access to the courts, *see Griffin v. Illinois*, 351 U.S. 12 (1956), for injuries unrelated to conviction and confinement, were not addressed. Nor did the courts below address Petitioner's nonconstitutional claims, which are based in part on

courts are reluctant even to remand for a new trial. *See Bergerco, U.S.A. v. Shipping Corp. of India. Ltd.*, 896 F.2d 1210, 1216 (9th Cir. 1990).[19]

III. HISTORY DOES NOT SUPPORT ABSOLUTE IMMUNITY

Contrary to Respondents' assertions, court reporters are not performing a task historically performed by judges. Judges have never been charged with producing verbatim transcripts, and judge note-taking had the same purpose at early common law it has today: aiding the judge's recollection. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 5, 18 (1983). The preparation of the record is, and historically has been, primarily the responsibility of the parties. *See* Fed. R. App. P. 10, 11. Consequently, court reporters cannot rely on history as a basis for according them absolute immunity now. *See Burns*, 111 S. Ct. at 1945-46 (Scalia, J., concurring in part and dissenting in part).

In refusing to recognize absolute immunity for no lesser a person than the Attorney General of the United States, this Court stated: "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established

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Ms. Ruggenberg's failure to return a $700 payment by Petitioner despite his indigent status.

[19] To Petitioner's knowledge, only one federal appellate court has remanded a civil case under Fed. R. App. P. 10(c) based on the lack, or delay in production, of a transcript. *See Bergerco*, 896 F.2d at 1217.

law." *Mitchell*, 472 U.S. at 524 (plurality opinion). Likewise, Petitioner does not believe that the judicial process in this country will be threatened if court reporters are given incentives to abide by clearly established law.

IV. CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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February 3, 1993

No. 91-7604

IN THE

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JEFFERY ANTOINE,

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v.

BYERS & ANDERSON, INC., AND SHANNA RUGGENBERG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OBJECTION TO MOTIONS FOR LEAVE TO FILE BRIEFS OF AMICI CURIAE

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Respondent Byers & Anderson, Inc. opposes the motions before the Court for leave to file briefs of amici curiae in support of petitioner. Specifically, respondent Byers & Anderson, Inc. opposes the motion for leave to file brief amicus curiae filed by Johnathan and Karen Scott, and further opposes the motion for leave to file brief of amici curiae filed by the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, and the Alliance for Justice. Respondent Byers & Anderson, Inc. responds to both motions for leave to file amici curiae briefs in this objection.

THE SCOTTS SHOULD BE DENIED AMICUS CURIAE STANDING.

Johnathan and Karen Scott have no special expertise to assist the Court in

deciding the issues in this appeal. The Scotts are not friends of the Court, they are interested party plaintiffs in a similar, but distinct lawsuit. For this reason, the Ninth Circuit Court denied the Scott's motion for leave to file an amicus curiae brief. See September 10, 1990 Order attached as an appendix to this objection.

The thirteen page fact statement upon which the Scotts base their amicus brief pertains solely to their own civil action which is currently pending in a Washington State Superior Court. This civil action does not raise the same constitutional issues raised in the instant case involving a convicted criminal defendant's right to appeal.

Respondent Byers & Anderson, Inc. would not be able to respond adequately to the Scotts' amicus curiae brief

because there is no factual record of the Scott case before the Court. Moreover, the Scotts argue in their amicus curiae brief that Washington State law may, in part, apply to the immunity issue in Scott. Scott amicus brief at 29. It would not assist the Court in the instant case for the parties to brief issues of Washington State law.

If the Scotts' motion for leave to file brief amicus curiae is granted, the respondents would be forced to dedicate a significant portion of their briefs to issues that are not relevant to the instant appeal, and would be forced to make these legal arguments with no factual record. The Ninth Circuit Court of Appeals denied Scotts' motion to file a brief amicus curiae, and this Court should similarly deny the Scotts' motion.

APPELLATE DEFENDER ASSOCIATIONS SHOULD BE DENIED LEAVE TO FILE BRIEF AMICUS CURIAE

The brief of amici curiae offered by the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, and the Alliance for Justice ("Appellate Defender Organizations") addresses essentially the same issues as the petitioner's brief. The brief focuses on the Appellate Defender Organizations' view of the limited role and function of a court reporter. The Appellate Defender Organizations have no expertise to assist the Court in its understanding of the duties and functions performed by court reporters. Moreover, these Appellate Defender Organizations primarily engage in criminal appellate defense work. Antoine's Petition for Certiorari in his criminal action was

United States v. Antoine, 906 F.2d 1379 (9th Cir.), cert. denied, 111 S. Ct. 398 (1990). These Appellate Defender Organizations have no special expertise to assist the Court in this civil action. Their motion for leave to file brief of amici curiae should be denied.

DATED this 4th day of December, 1992.

Respectfully submitted,

MERRICK, HOFSTEDT & LINDSEY, P.S.

By Tyna Ek

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY ANTOINE, Plaintiff/ Appellant-- Cross-Appellee vs. BYERS & ANDERSON, et al., Defendants/ Appellees -- Cross- Appellants.	)	Nos. 90-35362 90-35363 ...90-35293 DC# CV-88-260-RJB Western Washington (Tacoma) ORDER

Before: SNEED, Circuit Judge

The motion of Johnathan Scott and Karen Scott for leave to file an amicus curiae brief is denied. The brief shall be lodged for such consideration as the merits panel deems appropriate.

No. 91-7604

IN THE

Supreme Court of the United States

October Term, 1992

JEFFREY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC., AND SHANNA RUGGENBERG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT RUGGENBERG'S OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS OF *AMICI CURIAE*

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No. 91-7604

In The
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v.

BYERS & ANDERSON, INC., AND
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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT RUGGENBERG'S OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS OF *AMICI CURIAE*

Respondent respectfully objects to the Motion for Leave to File a Brief of *Amici Curiae* filed in support of Petitioner by The National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, and the Alliance for Justice.

In addition, Respondent respectfully objects to the Motion for Leave to File a Brief of *Amicus Curiae* filed in support of Petitioner by Johnathan and Karen Scott.

1. The *Amici Curiae* Brief Filed by the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association and the Alliance for Justice Only Repeats the Arguments Made in the Petitioner's Brief.

Respondent's objection is based in part on Supreme Court Rule 37.4 which provides that a motion to file an *amicus* brief "shall . . . set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case." The Motion For Leave To File Brief Of *Amici Curiae* violates Rule 37.4 as it fails to set forth any facts or questions of law that are not, or will not be, presented in the Brief of Petitioner.

More significantly, the proposed Brief of *Amici Curiae* is not of substantial assistance to the Court. According to Supreme Court Rule 37.1, an *amicus curiae* brief is helpful to the Court when it "brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. . . ." The legal arguments presented in the Brief of *Amici Curiae* are essentially identical to the legal arguments presented in the Brief of Petitioner. Nothing new or different is presented.

The following section by section comparison between the Brief of *Amici Curiae* and the Brief of Petitioner highlights the fact that the Brief of *Amici Curiae* presents little matter that is not already presented in the Brief of Petitioner:

Brief of *Amici Curiae* Section	**Brief of Petitioner Corresponding Pages**
I.A	14-17
I.B	17-21
II.A	31-35
II.B	22-24
III.A	26-29
III.B	30-31

Presentation of the same arguments is not helpful to the Court. The Brief of *Amici Curiae* does nothing but burden the staff and facilities of the Court and should not be considered.

2. The *Amicus Curiae* Brief Filed by Johnathan and Karen Scott Is Beyond the Scope of the Legal Issue Accepted for Review by this Court.

Respondent's objection to the *Amicus Curiae* brief filed by Johnathan and Karen Scott is based on Supreme Court Rule 37.1 which requires that an *amicus curiae* brief only bring "relevant matter to the attention of the Court . . . ." The brief does not present relevant matter because it argues legal issues not accepted for review by this Court.

Petitioner Antoine's petition for writ of certiorari presented the Court with the following question: "Whether the court of appeals erred in rejecting the decisions of other circuits and granting absolute, rather than qualified, immunity for a **court reporter** (emphasis added), even for conduct in violation of numerous court orders and statutory duties?" This issue and no other was accepted for review by the Court.

However, the proposed brief of *Amicus Curiae* does not address this issue. Rather, the brief is an attempt to have the Court decide whether immunity granted to a court reporter should be extended to the court reporter's employer. That is not the question before the Court.

The Brief of *Amicus Curiae* does nothing but burden the staff and facilities of the Court and should not be considered.

Respectfully submitted,

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No. 91-7604

IN THE

Supreme Court of the United States

October Term, 1992

JEFFREY ANTOINE,
Petitioner,
v.
BYERS & ANDERSON, INC. AND
SHANNA RUGGENBERG,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF AUTHORITIES

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No. 91-7604

IN THE SUPREME COURT OF THE UNITED STATES

February Term, 1993

JEFFREY ANTOINE,

Petitioner,
v.

BYERS & ANDERSON, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Johnathan and Karen Scott respectfully move for leave to file the attached brief *amicus curiae* in support of the petitioner in this case. The consent of

the attorney for the petitioner has been obtained and is attached. The consent of the attorneys for the respondents was requested, but refused.

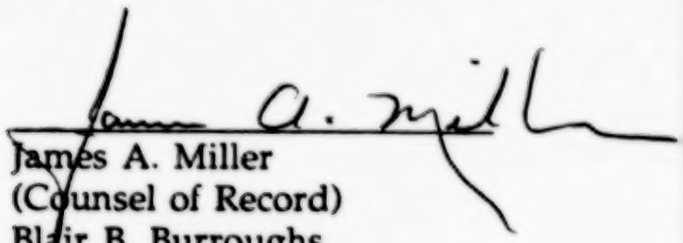
The interest of the Scotts in this case arises from the fact that they and the respondents in this action are parties to a lawsuit presently pending in the courts in Washington State. *Scott v. Byers & Anderson, Inc., et al.*, Superior Court for the State of Washington In and for Pierce County, Cause No. 88-2-09876-5. The subject of that case is the failure of Shanna Ruggenberg to record properly and to transcribe promptly the proceedings of a federal trial in which the Scotts were parties.

The central issue in *Scott v. Byers & Anderson* is identical to the main issue before this Court, namely, whether the respondents are entitled to absolute judicial immunity from tort liability. It is probable that the Court's decision in this case will be determinative of the Scotts' rights in their state court lawsuit against respondents.

Petitioner Antoine in the Court of Appeals and in his brief before this Court has focused his argument on the question whether a court reporter is entitled to absolute or qualified immunity for conduct in an official capacity which violates constitutional rights. In so doing, petitioner has essentially treated Shanna Ruggenberg and Byers & Anderson, Inc., as one, even though the Ninth Circuit Court of Appeals made separate holdings immunizing respondents from liability. The brief which the Scotts as *amici curiae* are requesting permission to file will contain a more complete argument on the question whether respondents should be treated as one. The brief is intended to point out that there is a separate analysis which should be applied to the question whether Byers & Anderson, Inc., is entitled to any immunity. If this argument is accepted, it would form a basis for finding Byers & Anderson, Inc., subject to liability even if it is

held that Ruggenberg is absolutely immune from suit.

Respectfully submitted,



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No. 91-7604

IN THE SUPREME COURT OF THE UNITED STATES

February Term, 1993

JEFFREY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT

The following facts, of which the Court may take judicial notice, are contained in the public court records of *Scott v. United States*, United States District

Court for the Western District of Washington at Tacoma, DC# CV-84-737-T; *Scott v. United States*, United States Court of Appeals for the Ninth Circuit, No. 86-4017, reported at *Scott v. United States*, 884 F.2d 1280 (9th Cir. 1989); and *Scott v. Byers & Anderson, Inc., et al.*, Superior Court for the State of Washington In and for Pierce County, Cause No. 88-2-09876-5.

It is probable that the Court's decision in this case will be determinative of the Scotts' rights in their lawsuit against respondents. These facts are presented so that the Scotts' interest in the outcome may be more fully understood. The pertinent facts are essentially parallel to those in this case.

Shanna Ruggenberg ("Ruggenberg"), an employee of Byers & Anderson, Inc. ("Byers & Anderson"), was the court reporter at the trial of a medical malpractice action brought against the federal government by the Scotts in the United States District Court for the Western District of Washington.

When plaintiffs' case came on for trial, the district court was operating under an emergency

situation with respect to court reporting services. The emergency situation was caused by the release of an official court reporter from his employment.

During the emergency situation, the district court contracted with Byers & Anderson for the provision of court reporting services. No written contract was entered into. Byers & Anderson had complete discretion as to which reporter to send to the district court. Ruggenberg was the person provided by Byers & Anderson.

The Scotts' original lawsuit was tried before the Honorable Jack Tanner in the United States District Court for the Western District at Tacoma, Washington, in the spring of 1986. The evidence at trial showed, and the trial court found, that Johnathan was born prematurely and in a hypoxic (oxygen starved) condition as a result of negligent medical care provided by government employees before, during, and after Johnathan's birth. Johnathan's negligent medical treatment caused an abnormal brain condition

which has resulted in his suffering from spastic quadriplegia, a form of cerebral palsy.

Johnathan is, at most, only mildly retarded. He has, however, severe neurological problems which impair his motor and communication skills. He cannot stand, walk, sit independently, or feed and care for himself. He needs computer assisted devices to communicate effectively. Johnathan will always require special equipment, lifetime attendant care, and medication, as well as extensive medical, physical, occupational, and speech therapy.

Plaintiffs were awarded judgment against the United States in the total amount of $11,101,000.21. The award included compensation to Johnathan for pain, suffering, and physical impairment; funds to provide for loss of future income; funds to pay for lifetime attendant care, medical services, supplies, and equipment; and compensation to Karen Scott for damage to the parent-child relationship. *Scott v. United States*, 884 F.2d 1280, 1282 (9th Cir. 1989).

At the conclusion of trial on May 8, 1986, the United States Attorney orally ordered a transcript of the proceedings from Ruggenberg. When the United States filed its Notice of Appeal on August 19, 1986, it also submitted a "Transcript Designation and Ordering Form." Under FRAP 11(b), Ruggenberg should have filed the trial transcript on or before September 18, 1986--thirty days after the transcript had been ordered. As discussed below, no transcript became available for appeal until a year and one-half later.

On October 2, 1986, Ruggenberg filed a motion for extension of time for filing the transcript and gave an estimated filing date of November 2, 1986. Ruggenberg advised the court that a backlog of work had caused the delay. The court granted the motion on October 22, 1986.

The transcript was not filed when promised. On November 3, 1986, Ruggenberg filed a second motion for extension of time, giving an estimated filing date of December 2, 1986. She again cited backlog as the reason

extension. The court granted this motion on November 19, 1986.

After Ruggenberg failed to file the transcript on December 2, 1986, counsel for the Scotts brought a motion to dismiss the appeal of the United States for failure to file the trial transcript. The motion was based, among other things, upon the affidavit of Dr. Stephen T. Glass, one of Johnathan's treating physicians. Dr. Glass stated in his affidavit that Johnathan required more physical therapy, occupational therapy, speech therapy, and non-vocal communication development therapy than was available to him through the public school system. Further, the delay in providing such additional therapy would irreversibly diminish the level to which Johnathan could improve in the future. The Scotts alleged that the delay in filing the trial transcript was, at the time plaintiffs moved to have the appeal dismissed, unreasonable.

In mid-December 1986, Ruggenberg filed a third motion for extension of time, estimating the transcript

would be filed on January 23, 1987. The reason cited for the need for an extension was again backlog. The transcript was not filed in January; nor was it filed in February. By this time, Ruggenberg had made numerous representations regarding production of the trial transcript to various individuals. In November 1986, she represented that a good portion of the trial transcript had been completed. She advised plaintiffs' counsel that portions of the transcript would be filed by February 6, 1987. No portion of the transcript was filed by that date. In addition, Ruggenberg did not respond to the efforts by Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, to obtain the transcript.

By a pleading dated March 3, 1987, Ruggenberg filed a fourth motion for extension of time. She indicated that the estimated filing dates would be March 9, 1987, for a portion of the transcript and March 13, 1987, for the remainder. Again, Ruggenberg failed to file the trial transcript as promised.

By order filed on March 4, 1987, the Ninth Circuit Court of Appeals directed Ruggenberg to file the transcript within 14 days. The court also ordered her to show cause why financial sanctions should not be imposed against her if the transcript was not filed by March 18, 1987. The transcript was not filed by March 18. In a second order filed on April 22, 1987, the Ninth Circuit observed that Ruggenberg had failed to respond to the March 4, 1987, order and had consistently failed to explain adequately her delays in filing the transcript. The court ruled that if she failed to file the transcript within seven days of the entry of the order, she would pay $100.00 per day to the court clerk until she filed the transcript. The Ninth Circuit Court of Appeals also ordered that Ruggenberg be incarcerated unless she filed the entire transcript within 28 days.

On May 15, 1987, the transcript still not having been filed, the Scotts brought a motion seeking an order directing Ruggenberg to return all records of trial proceedings to the district court for the purpose of turning such records over to Karen Larson, President

Elect of the Washington Shorthand Reporters' Association, to complete transcription of the trial record.

After Ruggenberg failed to follow the first two orders of the Ninth Circuit requiring production of the Scotts' trial transcript, the court entered a third order on June 11, 1987. The court observed that Ruggenberg had failed to respond to or comply with the prior orders. Accordingly, the court ordered Ruggenberg to show cause in writing within 14 days why she should not be incarcerated. Ruggenberg again failed to respond to the court's directive. This was noted by the Ninth Circuit Court of Appeals on July 10, 1987, when it issued its fourth order regarding Ruggenberg's failure to produce the trial transcript. In this order the court granted the Scotts' motion to compel Ruggenberg to return all records of the trial proceedings to the United States Marshall so that another court reporter could attempt to complete the transcript.

Ruggenberg's first formal acknowledgment of her delay in providing the transcript came through her

personal affidavit filed in the Scotts' lawsuit. In her affidavit dated July 24, 1987, Ruggenberg disclosed that in February 1986, when Byers & Anderson had dispatched her to the district court, she had been a court reporter for only one and one-half years. Before working for the court, she had only provided court reporting services to attorneys at depositions. Ruggenberg had not possessed any court reporter certification, either state or national. In her affidavit, Ruggenberg stated that Byers & Anderson had never given her any sort of written guidelines, rules, or instructions for her work at the court. She stated that Byers & Anderson had not provided her any place to complete her work for the court and that, consequently, she had to do that work at home.

Ruggenberg also stated in her affidavit that, although she had been overworked, Byers & Anderson had never dispatched another reporter to the court to relieve her. She said that after leaving the court in August 1986, she had continued to work for Byers & Anderson. Instead of permitting her to complete her

work for the court, Byers & Anderson had dispatched her to other jobs, despite her having a backlog from her court assignment. Ruggenberg stated that Byers & Anderson had required her to give priority to law firms who were its regular clients. Ruggenberg had not felt this was proper, but had acquiesced because she had wanted to keep her job with Byers & Anderson. The work priority issue had caused such friction that Ruggenberg had terminated her employment with Byers & Anderson.

In her affidavit, Ruggenberg also admitted she had been incapable of handling the responsibilities imposed upon her by Byers & Anderson. She acknowledged that she was inexperienced, unqualified, and had not received proper management or apportionment of work from Byers & Anderson.

The ongoing delay in the production of the trial transcript did not end with the court's order requiring Ruggenberg to turn over all of her shorthand notes, computer tapes of shorthand notes, partial transcripts, and tape recordings. When Ruggenberg first delivered

her materials to the United States Marshall, several days' worth of notes and tapes were missing. These were later secured by the Scotts through further requests to Ruggenberg's attorney.

When others attempted to transcribe the trial proceedings, it became apparent that Ruggenberg's notes and tape recordings were often indecipherable. This made transcription by the substitute court reporter difficult and time consuming. Because Ruggenberg's notes were indecipherable, further delay occurred when portions of the tape recordings of the Scotts' trial were sent to the Federal Bureau of Investigation in Washington, D.C., for electronic enhancement.

The trial transcript was finally filed on February 19, 1988. The appeal in the Scotts' case was, therefore, delayed for seventeen months because of Ruggenberg's inaction and omissions. As a result of this delay, Johnathan suffered irreversible damage to his rehabilitation efforts. The Scotts also suffered

substantial damages from lost interest and investment opportunities.

The Ninth Circuit Court of Appeals ultimately upheld most of the elements of damages awarded by the trial court, but reversed and remanded for a recalculation of the award because of the net discount rate used. *Scott v. United States*, 884 F.2d 1280, 1282 (9th Cir. 1989). Shortly before the trial on remand in June of 1990, the Scotts and the Government settled the case for $8,500,000.

Based upon the foregoing facts, the Scotts in their state court action have asserted claims sounding in negligence against both Ruggenberg and Byers & Anderson. Ruggenberg is alleged to be liable for her own negligence. Byers & Anderson is alleged to be vicariously liable for Ruggenberg's negligence, as well liable for their own negligent hiring and supervision of Ruggenberg. The Scotts' lawsuit in Washington State is presently dormant pending the outcome of this case.

SUMMARY OF ARGUMENT

Shanna Ruggenberg, acting as a federal court reporter, is not entitled to absolute immunity for failing to record properly and to transcribe promptly the proceedings of a district court trial. Even if this Court were to find, however, that such absolute immunity exists, such immunity should not extend to the reporting firm of Byers & Anderson, Inc., which never performed any adjudicatory functions. Moreover, an agent's immunity from civil liability generally does not establish a defense for the principal. Restatement (Second) of Agency § 217 (1958). Accordingly, any immunity of Ruggenberg as a government official would not shield her principal, Byers & Anderson, Inc., from tort liability, even when liability is predicated upon respondeat superior.

ARGUMENT

I. Ruggenberg is Entitled, At Most, to Qualified Immunity.

But for the holding of the Ninth Circuit Court of Appeals on court reporter immunity, the petitioner in

this case would have a justifiable cause of action. *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1473-74 (9th Cir. 1991). As petitioner notes in his brief, courts in the majority of federal judicial circuits have not held court reporters to be immune from suit, and have recognized that court reporters may be held liable for damages caused by their failure to perform properly their duties. In six other circuits, court reporters are only entitled to qualified immunity. *See, e.g., Smith v. Tandy*, 897 F.2d 355 (8th Cir.), *cert. denied*, 111 S. Ct. 177 (1990).

The Scotts join in the brief of petitioner on this issue, and agree that *Antoine* was wrongly decided. Court reporters should have, at most, a qualified immunity from suit. The Scotts will not burden the Court by repeating the arguments already advanced by petitioner, however.

The purpose of this brief is to demonstrate that even if the Court were to decide that Ruggenberg has

absolute immunity from suit, her principal, Byers & Anderson, is still subject to liability.

II. Any Immunity of Ruggenberg Does Not Absolve Byers & Anderson From Liability.

The Ninth Circuit Court of Appeals in *Antoine* focused its discussion almost exclusively upon Ruggenberg, and not Byers & Anderson. Nowhere in its opinion did the Ninth Circuit expressly state that Byers & Anderson was entitled to the same absolute quasi-judicial immunity Ruggenberg enjoys. The court's sole statement as to the liability of Byers & Anderson was this:

> Because Ruggenberg is entitled to absolute quasi-judicial immunity, the district court correctly determined that Byers & Anderson is likewise not liable to Antoine. This is so regardless of Ruggenberg's employment relation with Byers & Anderson.

950 F.2d at 1477. The Court of Appeals cited no authority to support its holding on this point.

Logically, the court's holding in *Antoine* with respect to Byers & Anderson must have been based upon one or both of the following premises: (1) Byers & Anderson stands on the same footing as Ruggenberg and is entitled to invoke the same absolute quasi-judicial immunity; or (2) Byers & Anderson is immune because the immunity of its agent, Ruggenberg, flows or extends to it as principal. Neither premise is correct.

A. Under Any Immunity Analysis, Byers & Anderson Cannot be Said to Have Functioned in a Judicial Capacity.

In reaching its holding, the Ninth Circuit Court of Appeals in *Antoine* principally relied upon the decision of this Court in *Forrester v. White*, 484 U.S. 219 (1988). The analysis it used was a functional one. For the court, the determinative factor was the offending act itself--not the person who performed the act. The pivotal question for the court was whether the acts of Ruggenberg in question were judicial in nature. Since the court's answer to this question was

"yes," absolute quasi-judicial immunity attached. *Antoine*, 950 F.2d at 1475-76.

Assuming, for the sake of argument, that the Court of Appeals was correct, the same conclusion should not be drawn as to the conduct of Byers & Anderson. To determine whether Byers & Anderson has any immunity under the Ninth Circuit's functional analysis, it must be determined whether Byers & Anderson's challenged conduct was judicial in nature. It clearly was not.

The firm of Byers & Anderson did not function as a federal court reporter. The firm neither recorded court proceedings nor attempted to transcribe those proceedings. All Byers & Anderson did was to contract with the district court to provide reporters who in turn would perform those reporting functions in judicial proceedings.

It is alleged, among other things, that Byers & Anderson was negligent in its hiring and supervision of Ruggenberg. Such employment decisions and responsibilities do not meet the *Forrester* and *Antoine*

prerequisites for absolute quasi-judicial immunity: they are not judicial functions, nor are they part and parcel of the judicial process. These personnel decisions are administrative, not judicial in nature. For this reason, Byers & Anderson is no more entitled to claim the benefit of absolute quasi-judicial immunity than was the judge in *Forrester* who improperly discharged a court employee:

> In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts--like many others involved in supervising court employees and overseeing the efficient operation of a court--may have been quite important in providing the necessary condition of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other executive branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public

> institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.

Forrester, 484 U.S. at 229.

Under *Forrester*, there is no justification for granting Byers & Anderson immunity from suit, even if this Court accepts and upholds the functional analysis as applied by the Ninth Circuit in *Antoine*. The acts of Byers & Anderson were not "part of the adjudicatory function." *Antoine*, 950 F.2d at 1475.

B. Any Immunity of Ruggenberg as an Agent Does Not Extend to Byers & Anderson as her Principal.

It is probable that the Ninth Circuit's holding in *Antoine* absolving Byers & Anderson from liability was not predicated upon the conclusion that this reporting firm had acted in any judicial capacity. The court's holding and the context in which it appears suggest that the Court of Appeals simply assumed that Byers & Anderson was immune because Ruggenberg was immune. This assumption is legally flawed.

Any suggestion that Byers & Anderson cannot be held vicariously liable for Ruggenberg's negligence because she is immune from suit demonstrates a misperception as to the nature of vicarious liability. This precise issue was discussed in the context of employee immunity and employer vicarious liability in *Guffey v. Logan*, 563 F. Supp. 951 (E.D. Pa. 1983). The court first discussed the policy underlying vicarious liability as stated by Dean Prosser:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance to the public and so to shift them to society, to the community at large. Added to this is

> the make weight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.

563 F. Supp. at 954, *quoting* W. Prosser, *The Law of Torts*, § 69 (1971). In light of these policies, the court stated:

> The predicate then for finding an employer vicariously liable is that the employee was negligent, not that the latter was liable.

Guffey, 563 F. Supp. at 954. No one has ever claimed that Ruggenberg was not negligent, only that she was immune from suit. Byers & Anderson, as Ruggenberg's principal, should be liable for that negligence.

If any presumption exists, it should be that the immunity of an agent does not extend to his or her principal.

> [A]n immunity from liability does not mean that a person did not commit a negligent, harmful act. It only means that for certain policy reasons liability is precluded against that person. In the

> interest of compensation to the victim, it should not be presumed that the immunity from liability given to the negligent person is carried over to others whom the victim can sue. Rather, the presumption should be the other way. Thus, unless the purpose of the immunity would be thwarted by carrying it over to others, suit against the others will lie.

Davis v. Harrod, 407 F.2d 1280, 1284 (D.C. Cir. 1969) (Judge J. Skelly Wright). The rule that a principal is not freed from a lawsuit because of an agent's immunity is followed in most jurisdictions.

> [T]he rule in this Commonwealth and the rule more commonly adopted across the country is that an agent's immunity does not extend to a principal against whom liability is sought under the doctrine of respondeat superior.

Taplin v. Town of Chatham, 453 N.E.2d 421, 423 (Mass. 1983).

This rule of agency has been adopted by the American Law Institute in its Restatement:

> In an action against a principal based on the conduct of a servant in the course of employment:
>
> * * *
>
> (b) The principal has no defense

> because of the fact that: . . . (ii) the agent had an immunity from civil liability as to the act.

Restatement (Second) of Agency § 217 (1958). The holdings of the numerous authorities listed in the citations to this section of the Restatement were recently summarized as follows:

> [W]here the agent has an immunity from civil liability dependent on his or her peculiar status (as for example a family relationship to the injured party, official immunity of some sort or other, infancy, incompetence, etc.) subsection (b) applies and the principal cannot avail itself of its agent's defense.

Sundance Cruises Corp. v. American Bureau of Shipping, 799 F. Supp. 363, 391 S.D.N.Y. (1992).

The State of Washington has adopted and followed this section of the Restatement. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). A central issue in *Babcock* was whether DSHS caseworkers of the Washington Department of Social and Health Services should be immune from liability for negligent foster care investigation and placement. The court

ultimately concluded that caseworkers were entitled to a qualified immunity. 116 Wn.2d at 618.

Since the State was also a party to that action, the court was then called upon to decide whether the immunity granted to caseworkers would be extended to the State. The court concluded that the immunity of caseworkers did not extend to the State:

> An agent's immunity from civil liability generally does not establish a defense for the principal. Restatement (Second) of Agency § 217 (1958). Accordingly, the immunities of governmental officials do not shield the governments which employ them from tort liability, even when liability is predicated upon respondeat superior.

Babcock, 116 Wn.2d at 620. *See also, Waller v. State*, 64 Wn. App 318, 333-34, 824 P.2d 1225 (1992). If, as discussed below, the law of Washington State is applied to this aspect of this case, *Babcock* negates any claim by Byers & Anderson that it is immune solely because Ruggenberg may be immune from suit.

It is not being suggested that Washington law controls every aspect of the disposition of this case. It

should, however, apply to the issue of any immunity of Byers & Anderson. It is a general rule that in most fields of activity this Court has refused to find federal pre-emption of state law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). There are certain areas of uniquely federal interests, however, were state law is pre-empted and replaced, where necessary, by the so-called "federal common law." *Id.*

One of the areas which this Court has "found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty." 487 U.S. at 505. Thus, even though Ruggenberg apparently was never hired or sworn in as an official federal court reporter, she did act as a federal agent under authority of federal law. It is assumed, therefore, that the scope of her civil liability is controlled by federal, not state, common law. *See, e.g., Howard v. Lyons*, 360 U.S. 593, 597 (1959).

In contrast, as discussed above, Byers & Anderson never acted in an official judicial capacity. It

merely had a contract with the district court to provide court reporters on an emergency basis. It acted as an independent contractor performing under its contract, rather than as an official performing duties as a federal employee. *See Boyle v. United Technologies Corp.*, 487 U.S. at 505.

The lawsuits of Antoine and the Scotts against Byers & Anderson, while obviously arising out of the performance of that contract, are purely private and do not touch the rights and duties of the United States judiciary. This is so because these plaintiffs do not seek to impose upon Byers & Anderson any duty contrary to the duty imposed by the Government contract; that is, to provide competent court reporters to the court. Where the private litigant simply seeks to enforce the contractual duty already owed to the Government, there is no uniquely federal interest which would require displacement of state law. *See Boyle v. United Technologies Corp.*, 487 U.S. at 506-08; *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977). Because no federal interests exist regarding Byers & Anderson, the law of

Washington should be applied. Byers & Anderson should be subject to suit for the acts of its agent, even if that agent is herself immune from suit. *Babcock v. State*, 116 Wn.2d at 620.

Even if this Court were to conclude that Washington law should be displaced by federal common law on this point, the outcome should be the same. While counsel for the Scotts have been unable to locate a decision of this Court which addresses this specific issue, there is no reason to believe that a contrary rule is part of the federal common law. A number of federal cases following the Restatement of Agency have been cited above. No countervailing rule has been located. Thus, even if the Court concludes that there is a uniquely federal interest regarding to the question of the immunity of Byers & Anderson, "[t]hat merely establishes a necessary, not sufficient, condition for the displacement of state law." *Boyle v. United Technologies Corp.*, 487 U.S. at 507. No displacement will occur unless there is a significant conflict between

the state law and a federal policy, interest, or statute. *Id*.

The federal and state interests in this instance are identical. There is no federal interest to be served by permitting Byers & Anderson to escape liability for its actions and those of its agent. The federal and state interests both favor compensating victims suffering loss. "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980). Immunizing the principal here would thwart that objective. This Court itself has cautioned that when a court is considering granting absolute immunity, the negative aspect of immunity must be kept in mind:

> [O]fficial immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.

Westfall v. Erwin, 484 U.S. 292, 295, (1988). Byers & Anderson should be held accountable.

CONCLUSION

Based upon the foregoing reasons, the decision of the Ninth Circuit Court of Appeals in *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471 (1991), should be reversed and remanded to the district court for a trial on the merits.

Respectfully submitted,

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November 23, 1992.

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RE: United States Supreme Court Review of Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (Supreme Court Case No. 91-7604)

As the attorney of record for the Petitioner, Jeffery Antoine, I hereby consent to the filing of an amicus brief in support of the Petitioner by Mills, Cogan, Meyers & Swartling in the above matter.

DATE: Nov. 20, 1992

M. Margaret McKeown
Jeffrey M. Thomas
Attorneys for the Petitioner
Jeffery Antoine

No. 91-7604

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JEFFERY ANTOINE,
Petitioner,
v.
BYERS & ANDERSON, INC. and SHANNA RUGGENBERG,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE, NATIONAL COURT REPORTERS ASSOCIATION, IN SUPPORT OF AFFIRMANCE

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BRIEF OF AMICUS CURIAE, NATIONAL COURT REPORTERS ASSOCIATION, IN SUPPORT OF AFFIRMANCE

INTEREST OF THE AMICUS CURIAE

The National Court Reporters Association (hereinafter "NCRA"), formerly known as the National Shorthand Reporters Association, is made up of 30,000 professional court reporters of whom approximately 20,000 are currently practicing. The profession of court reporting is dedicated to the efficient and just operation of the judicial system and to ensuring equal access of all parties to the protections of the judicial process. The aim of NCRA is to promote these goals on a national basis. Among its other functions, NCRA promotes professionalism, conducts educational and certification programs, investigates the development and application of technology to court reporting, issues opinions and administers discipline for

violations of the profession's Code of Professional Conduct, and monitors and records the history and status of the profession. NCRA is uniquely qualified to provide the Court with illumination regarding the function of court reporting in the American legal system.

SUMMARY OF THE ARGUMENT

Court reporters should be given absolute quasi-judicial immunity when acting within the scope of their authority because that function is an integral part of the judicial process. Since all immunity relates to the function performed and not the title of the official, the immunity analysis is made person by person and function by function. Absolute immunity from personal liability is afforded judges for acts done in the exercise of functions which are judicial rather than administrative. The function of court reporting is a quasi-judicial act, not an administrative one, and thus deserves the same protection.

The function of the court reporter is inextricably entwined with the judicial process in the American system of jurisprudence. Historically, the judge performed the function of keeping a record of the proceedings through his personal notetaking. The purpose of this record was to aid him in the adjudicative process and for his reference and the reference of other judges in post-trial actions. Reliance on the accuracy of the record became essential to the appellate system. At the time of the seminal American case in the area of judicial immunity, *Bradley v. Fisher*, there was no consistent use of court reporters in American jurisprudence. Instead, the judge and litigants depended on the judge's notetaking or summary of the record. The evolution of the use of court reporters resulted from the desire to have a verbatim record for appellate purposes and the inability of the judge to both conduct the increasingly complex proceedings and take adequate notes to produce such a record.

The function now performed by court reporters enjoyed judicial immunity at common law because it was, in fact, a function performed by judges in the adjudicative process.

The court reporter continues to share certain functions in common with the judge. The court reporter, for instance, may stop the proceedings to clarify responses or identification and must constantly make decisions regarding the most accurate way to record the proceeding. The charge to the court reporter to produce a "verbatim" record is always filtered through the presumption that the record will also be an "intelligent" record of the proceedings. Trial judges and attorneys have uniformly lodged complaints against experiments with the use of audio and video records of proceedings done without a court reporter. Complaints have included instances where statements are lost when people speak over each other, physical gestures that should be part of the record are not recorded or interpreted, sounds that are not appropriately part of the record are recorded, and speaking parties are not named and thus confusion arises as to identification.

The acts of transcribing and certifying the record are also essential and inseparable elements of the judicial function of the court reporter because of the critical nature of the record to the judicial process.

The proof of the inextricable nature of the function of court reporting is that the record is not subsumed by the judge's opinion. On review, the appellate court is presented with not only the opinion of the judge, but also with the independent record of the proceeding below. The transcript is considered so essential that appellants who do not have access to a trial record may be granted a hearing, or in extreme cases a new trial, for that reason alone. The record of the proceedings is essential in every phase of the trial and appellate process and thus inextricably entwined in the judicial process.

The policies supporting the court reporter's immunity share the characteristics of the policies supporting absolute judicial immunity. Just as with judges, the independence of court reporters is essential to the judicial process. Just as with judicial errors, there are remedies for a court reporter's errors within the judicial process itself and additional professional safeguards as well. Finally, the threat of frivolous suits against court reporters, like those against judges, would severely hamper the efficiency of the courts and permit collateral attacks on judgments. The use of the qualified immunity standard will not remove the threat of vexatious litigation since there is no uniform standard of qualified quasi-judicial immunity for court reporters within the circuits and such suits will undoubtably be fact-based and therefore not amenable to summary judgment.

It has long been recognized that judicial immunity must be preserved, however erroneous the act may have been, and however injurious its consequences, as long as the act was within the jurisdiction of the court. The court reporter in the instant case was performing a function which was both within her authority and an integral part of the judicial process. Therefore, even if the Petitioner could prove that the sanctions imposed against the court reporter and the post-trial relief that he received were incomplete, the importance of quasi-judicial immunity to the judicial system demands it be preserved in the instant case. The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

I. THE STANDARD OF ANALYSIS FOR AFFORDING ABSOLUTE QUASI-JUDICIAL IMMUNITY IS WHETHER THE FUNCTION EXAMINED IS AN INTEGRAL PART OF THE JUDICIAL PROCESS AND NOT MERELY AN ADMINISTRATIVE ACT.

Absolute judicial immunity is afforded for acts done by judges "in the exercise of their judicial functions." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872). "If such [is] the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Id.*

The analysis of whether a particular function deserves absolute immunity turns on the nature of the function. *Forrester v. White*, 484 U.S. 219, 224 (1988).[1] In order to be afforded absolute judicial immunity, the nature of the function must be judicial rather than administrative, legislative or executive. *Id.* at 227.

Absolute immunity is also afforded to persons whose quasi-judicial functions are "intimately associated with" and an "integral part of" the judicial process. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). As the Court of Appeals for the Ninth Circuit stated in the present case:

> Judicial immunity is not limited to judges. It extends to other government officials who play an integral part in the implementation of the judicial function. Such officials enjoy derivative immunity (quasi-judicial immunity) which can be absolute if their conduct relates to a core judicial function.

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[1] A secondary analysis, the effect that exposure to liability would have on the appropriate exercise of the function, as well as various public policy factors that favor absolute judicial immunity as examined in *Forrester* and other decisions, are discussed in Section II below.

Antoine v. Byers & Anderson, Inc., 950 F.2d 1471, 1474 (9th Cir. 1991), *cert. granted*, —— U.S. ——, 113 S. Ct. 320 (1992).

A. The Function of the Court Reporter Is an Integral Part of the Judicial Process.

Consistent with the Court's approach in *Imbler*, the immunity analysis begins with an examination of the historical development and role of the court reporter [2] in the Anglo-American judicial process.[3] The Anglo-American judicial system developed a review or appellate process early in its history. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). The American process generally limits the appeal to a review of the record with no new testimony or fact finding in order to promote the policy of finality. *United States v. Burke*, 781 F.2d 1234, 1246 (7th Cir. 1985). Essential to this system is the accuracy of the record.

The critical nature of the record developed early in the common law and coincided with the development of the doctrine of judicial immunity. J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879, 881. Under Anglo-Saxon law in the tenth

[2] For purposes of this brief, the Amicus takes no position on the employment relationship, if any, between the Respondents, but rather will only address the issue of the availability of absolute immunity.

[3] *Imbler* involved an action against a state official under 42 U.S.C. § 1983 and this historical analysis has been the traditional starting point for analysis by the Court in questions of immunity for persons acting under color of state law. This Court has held that common law immunities, such as judicial and quasi-judicial immunity, were not abolished by the Civil Rights Act of 1871, now 42 U.S.C. § 1983 (1988). *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Instead, an analysis is made of "the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. This same analysis should apply in the present case, which involves an action against an individual who was acting as a federal agent under 28 U.S.C. § 1331 (1988). *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982).

and eleventh centuries, a dissatisfied litigant could bring a charge of "false judgment" whereby the court issuing the judgment was required to make a written record of its proceedings and submit it to a superior lord. The complainant could either accept the record, thereby narrowing the issues on appeal to a review of the lower court's decisions, or challenge it by participating in physical combat with the champions of the inferior court. If the challenge to the record succeeded, the judgment was annulled. *Id.*

This process of contesting the written record by physical combat was eventually replaced by the doctrine of sanctity of the record, which reflected the confidence of all parties in the records kept of the king's court proceedings. This doctrine was developed to bring a measure of finality to the case. *Id.* at 883. Once the record was presumed correct, then the appeal was limited to questions of law and the sufficiency of the lower court's determinations.

During the same period, the ecclesiastical model of hierarchical courts began to influence the development of the common law appeal process. *Id.* at 882. The doctrine of judicial immunity was then employed to enhance the concept of finality, by eliminating collateral attacks against the judge, and forcing appeals up through the court hierarchy. *Id.* at 884.

While a faithful and intelligent record [4] of the proceedings has always been essential to the appellate process, a verbatim record was not always required. In early English courts, the official record took the form of notes taken by the judge during the proceeding and used by him in the adjudicative process and by others in the

[4] The term "faithful and intelligent" is used to describe a record which is not merely a mechanical reproduction of sounds that occurred, but one that includes the detail, organization and identification required to make it intelligible as well as accurate.

post-trial appellate process. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 5-8, 19-20 (1983). It was impossible, of course, for most judges to both conduct the trial and attempt to produce anything resembling a verbatim record.[5]

The shift in American courts from fact-pleading to notice-pleading around the time of World War II, with the concomitant increase in the use of discovery and depositions as well as the availability of technology such as stenographic machines, combined to make the verbatim record both possible and desirable. David J. Saari, *The Court and Free-Lance Reporter Profession* 43 (1988). In 1944, Congress enacted the Court Reporter Act, ch. 3, 58 Stat. 5 (the current version of which is codified at 28 U.S.C. § 753 (1988)), which required all federal courts to make verbatim records of their proceedings.

It is generally agreed that the first verbatim court reporter was hired by the New York State Supreme Court in 1866. Jim Haviland, *Philander Deming's Role*, Nat'l L.J. at 15 (Apr. 12, 1982). The practice grew slowly, and, as Petitioner notes in his brief, at the time of *Bradley v. Fisher*, in 1871, there was not a general use of court reporters. (Petitioner's Br. at 32, n.24.) This does not mean that the function of the court reporter, establishing a written record of the proceedings for use at trial and in appellate proceedings, was not being performed. As stated above, it was being done by the judge, albeit in a form less useful than the verbatim form preferred today.

Accordingly, the production of the written record of court proceedings is intimately associated with and is

[5] It is not unusual for oral testimony to occur at a rate of up to 260 words per minute, the current skill test requirement for the Certificate of Merit issued by NCRA to its Registered Professional Reporters. *See* National Court Reporters Association, The NCRA RPR and CM Certification Program 1 (Jan. 1990) (lodged with the Clerk).

an integral part of the judicial process, not simply because it is inextricably intertwined with the appellate process, but, perhaps more importantly, because it was once and to some extent still is performed by the trial judge as part of his adjudicative actions. *See* Oswald M.T. Ratteray, *Verbatim Reporting Comes of Age*, 56 Judicature 368, 373 (1973). When the *Bradley* Court recognized the doctrine of judicial immunity in 1871, the process of producing a written record of the proceeding was necessarily one of the acts to which it was granting immunity, since it was a function performed by a judge as part of the adjudicative process at that time.

Modern court reporters share in several other functions exercised by judges. Like the judge, the court reporter can stop the proceedings to clarify something for the record and may direct questions to witnesses and counsel. Like judges, court reporters are completely independent of all the parties. This is necessary in order to ensure their impartiality. Like judges, a primary purpose of the court reporter is to ensure equal access by all litigants to the protections of the judicial process. The primary means of doing this is by providing a faithful, intelligent and independent record of the proceedings. This function has evolved even further with modern technology, to the point where a court reporter using computer-aided transcription equipment can now produce simultaneous "real-time" written text, braille text, and text-integrated video of an oral proceeding, in order to assure equal participation and access by physically impaired and disabled litigants, judges, jurors and counsel. This function of ensuring equal protection is a judicial function of the highest order.

Since its seminal decision on absolute judicial immunity in *Bradley* over one hundred twenty years ago, the Court has been asked on several occasions to analyze the immunity appropriate to the functions of other officials who are involved in the judicial process. As noted above,

in *Imbler*, the Court stated that an analysis of whether to grant immunity to a given official had to be done on the basis of whether the acts of the official had been accorded immunity "at common law and the interests behind it." *Imbler*, 424 U.S. at 421.

Imbler involved an allegation about the conduct of a state prosecutor.[6] The Court discussed the doctrine of judicial immunity and the policy behind it and concluded that "the [state prosecutor's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 424. In its various decisions, the Court has not only granted absolute quasi-judicial immunity to prosecutors, as in *Imbler*, but also to jurors, *see Butz v. Economou*, 438 U.S. 478, 509-10, 511-12 (1978), and witnesses, *Briscoe v. LaHue*, 460 U.S. 325 (1983), for acts which are intimately associated with and an integral part of the judicial process.

We can find no decisions by this Court on the question of whether a court reporter's function is similarly protected by quasi-judicial immunity. The several courts of appeals that have considered this question have been split in their decisions.

The court reporter's function of recording, transcribing and certifying the proceedings is an integral part of every phase of the judicial process. Petitioner himself states that it is so important that it was essential to his civil rights. (Petitioner's Br. at 30). Federal courts must make a verbatim record of the proceedings and the record must be certified. 28 U.S.C. § 753(b). During trial, the record may be read back by the court reporter to refresh memory or impeach a witness. Trial transcripts are relied upon by judges in the adjudicative process. Transcripts of trials must be ordered by the appellant and provided to the appellate court. *See, e.g.*, Fed. R. App. P. 10(b). Such transcripts are "deemed prima facie a correct statement of the testimony taken and proceedings had" (*id.*) and the appellate court will rely on their accuracy in making its decision. The record, and therefore the court reporter who constructs the official record, plays an integral part in each phase of the judicial process and is inextricably entwined with it.

[6] Although *Imbler* was brought under 42 U.S.C. § 1983, the same analysis of judicial immunity applies to cases, such as the present one, which are based on 28 U.S.C. § 1331 (1988). *See* note 3 *supra*.

B. The Function of the Court Reporter Is Judicial in Nature, Not Administrative.

As articulated in *Forrester* and other cases, the "functional" test requires a determination that the nature of the function is judicial and not administrative. In the present case, Petitioner's characterization of the process of producing a verbatim record as being a mechanical or administrative one is overly simplistic and does not square with reality.

In *Scruggs v. Moellering*, 870 F.2d 376 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989), Judge Posner, writing for the court of appeals in an opinion granting absolute immunity to both a judge and court reporter alleged to have conspired against a litigant, addressed both the function of the court reporter and the policy behind absolute immunity as follows:

> A judge has absolute immunity from damages liability for acts performed in his judicial capacity, *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L.Ed.2d 555 (1988), and the preparation of the record for appeal is such an act. It is not a matter simply of gathering all the documentary and nondocumentary materials that have been filed in the case and shipping them to the appellate court. Determining the composition of the appellate record entails a number of decisions that require skill and judgment. Cf. Fed.R.App.P. 10. Even the preparation of an

accurate transcript by the court reporter is not a mechanical process, given the difficulty of accurately transcribing what often are rapid-fire oral testimony and colloquy. Auxiliary judicial personnel who perform functions at once integral to the judicial process and nonmechanical are entitled to absolute immunity from damages liability for acts performed in the discharge of those functions, just as judges are. See *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir. 1987), and cases cited there. Although these cases precede *Forrester*, where the Supreme Court distinguished judicial from merely administrative functions, their principle has been reaffirmed since. See *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir. 1987), which held that a court clerk could not be sued for refusing to accept an amended filing and otherwise (it was alleged) abusing his authority.

870 F.2d at 377.

Recent experiments have been conducted in an attempt to substitute audio or video recordings of court proceedings for professional court reporters. The products of those experiments have been routinely criticized by both judges and attorneys. *See* Oregon State Court Appellate Videotape Evaluation Committee, Videotape Court Reporting 6-8 (Sept. 1992) (lodged with the Clerk); *see also* Justice Research Institute, "Making the Record," Court Reporting and Technology 8 (March 4, 1992) (lodged with the Clerk) (stating that over 90% of federal district court judges currently elect to use court reporters even though the alternative of electronic sound recording has been available since 1984). These judges and lawyers complain that an exact and mechanical reproduction of the trial proceeding is inadequate to produce a record that is both faithful and intelligent for use by an appellate tribunal.

The difficulties arise because, without a court reporter present to monitor the proceeding and filter the oral

colloquy, the record may have inaudible areas where people speak over each other; there are noises that are inappropriate to the record that are recorded (such as sidebars or background noise); there are physical or visual events that should be part of the record that do not appear (such as answers given by head movements or pointing to a document); and speakers may be unidentified or misidentified. *See* Saari, *supra*, at 45. The Judicial Concerns & Standards Commitee of the American Judges Association recently concluded that the use of a professional court reporter was essential because "electronic recording may not reflect the gestures, demeanors, and postures of witnesses or help in descriptive matters." American Judges Association, 1991-1992 Electronic Court Reporting 5 (n.d.) (lodged with the Clerk).

The construction of a faithful and intelligent record of a proceeding requires much more than just the mechanical reproduction of every sound. Indeed, the definition of "verbatim" may even differ from court to court according to local practice, but it rarely means every sound made. The court reporter's function includes constant filtering of the oral activity, even to the point of intervening in and stopping the trial, to ensure that the record faithfully and intelligently reflects all that has transpired and not just the noises that occurred.[7]

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[7] Like the Ninth Circuit below, Amicus rejects the idea that a function must be discretionary to be immune. *See, Antoine*, 950 F.2d at 1476 n.4. While it is true that in many cases the use of discretion is a factor in granting a particular immunity, this is not a requirement for all grants of absolute immunity. For instance, under *Briscoe v. La Hue*, absolute quasi-judicial immunity is available to witnesses to encourage the independence of their testimony. 460 U.S. at 333. The Court in *Briscoe* did not grant absolute immunity to witnesses based upon any discretionary function. Indeed, witnesses are instructed to answer each question posed to them and only the question posed and to tell the whole truth. A witness who decides to exercise discretion in whether or not to answer a question may be subject to contempt and one who decides to exercise discretion in whether or not to tell the truth may be

The Petitioner has attempted to separate the act of transcribing and constructing the record from all the other functions of the court reporter and seeks to characterize it as a mechanical or administrative function. (Petitioner's Br. at 19.) It is artificial and unrealistic, however, to separate the process of transcribing and constructing the record from the function of recording it by means of handwritten or machine-generated notes during the actual court proceeding. They are one and the same activity and deserve the same immunity. In a case where the judge based his decision on his personal notes, it would be ludicrous to suggest that the act of his taking notes would receive absolute immunity—because it was part of the adjudicative function—but that he could be sued if his handwriting were illegible or he lost his notes on the basis that these were mechanical or administrative functions.

The act of transcribing and constructing the record, which is essentially a function of translating the notes taken during trial into a comprehensive written record, involves constant decisions about accuracy, including such minute details as the insertion of the correct punctuation to reflect the meaning of the speaker. The function of the court reporter is clearly judicial and not administrative in nature.

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liable for perjury. The rationale applied to the grant of absolute immunity to witnesses is that they fulfill a function that is an "integral part of the judicial process." 460 U.S. at 335. This is the same analysis that must be applied to the function of the court reporter. Having said that, while discretion is not a requirement for immunity, in fact, as the discussion of the function above reveals, the court reporter is frequently called upon to exercise discretion to ensure an intelligent record.

II. THE POLICIES UNDERLYING ABSOLUTE JUDICIAL IMMUNITY SUPPORT ABSOLUTE QUASI-JUDICIAL IMMUNITY FOR COURT REPORTERS.

As the Court stated in *Forrester*, "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." 484 U.S. at 224. The policies behind granting absolute immunity for judicial acts have their basis in common law policies designed to ensure the independence of the person performing the function (*Bradley*, 80 U.S. (13 Wall.) at 347) and to remove barriers to the effective conduct of the court system, *see, e.g., Imbler*, 409 U.S. at 425; *see also* Block, *supra*, at 886-87 (quoting *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607)).

The Court has enunciated on several occasions a variety of policy concerns underlying absolute immunity.[8]

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[8] In *Cleavinger v. Saxner*, the Court listed the following non-exclusive characteristics of a function deserving absolute immunity:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

474 U.S. 193, 202 (1985) (citing *Butz v. Economou*, 438 U.S. at 512).

In *Pierson v. Ray*, Justice Douglas listed the following policy justifications for absolute judicial immunity:

> (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers.

386 U.S. 547, 564 n.4 (1967) (Douglas, J., dissenting).

The three policy considerations most pertinent to the analysis of the function of court reporting are (i) the need to ensure the independence of the person performing the function; (ii) whether there are other safeguards and remedies that reduce the need for private damages; and (iii) the avoidance of vexatious litigation and collateral attacks on the judicial process. An analysis of these three policy considerations supports the granting of absolute immunity to the function of court reporting.

A. It Is Essential to the Judicial Process to Ensure the Independence of the Function of Court Reporting.

It is crucial that the person making the record of the proceedings be independent of any party. The fact that counsel, litigants and even judges cannot unilaterally direct the court reporter to change something in the transcript is essential to the doctrine of sanctity of the record. For instance, if a judge could privately order deletions in a faithful and intelligent transcript—that otherwise would include descriptions of disparaging sounds or gestures made by the judge—then a litigant who wished to appeal a judgment based on the bias of the judge would be hard put to present such an argument. The integrity of the judicial process would also be undermined if counsel to one party could privately pressure the court reporter to delete or change portions of a transcript by threat of litigation.

The importance of an independent record cannot be questioned in a judicial system such as the American one where the appellate tribunal receives not just the opinion of the judge of the lower court, but also a certified record of the proceedings. Only by having both the opinion and the record can the appellate court decide important questions of judicial error or prejudice. *See* Saari, *supra* at 46. Furthermore, since the judge and other participants are aware that a verbatim record is being made of the proceedings, the record becomes "an enemy of capriciousness." *Id.* (quoting David W. Louisell & Maynard E. Pirsig, *The Significance of Verbatim Recording of Proceedings in American Adjudication*, 38 Minn. L. Rev. 38 (1953)). In order to ensure an independent record, the court reporter must be independent, which can only be achieved by absolute immunity from liability.

B. There Are Other Remedies and Safeguards Available That Reduce the Need for Private Damages.

Innumerable safeguards and remedies, both procedural and professional, are available to correct errors made by a court reporter. Here, the federal rules offered a means of reconstructing the transcript and of remanding the case for a further consideration of possible prejudice due to the lack of an adequate transcript.[9] See Fed. R. App. P. 10(c). The court below could and did take personal actions against the court reporter who was arrested and fined. Order of United States District Court for the Western District of Washington: 1) Granting Defendants' Motion for Summary Judgment; 2) Denying Plaintiff's Motions for Leave to File Amended Complaint; and 3) Order of Dismissal, February 16, 1990, Joint Appendix at 24. Errors in transcripts can be corrected by motion or sua sponte in open court. Errors in deposition transcripts can be corrected by agreement of the parties. The decision of a judge not to correct an alleged error in the transcript can be appealed. This Court has recognized that the presence of such procedural safeguards and remedies means there is a less pressing need for individual suits to correct constitutional errors. *Butz v. Economou*, 438 U.S. at 512.

In addition to these procedural safeguards, the profession itself provides safeguards by the training, qualification and discipline of official reporters. NCRA certifies

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[9] An extreme example of this remedy is *Bashlor v. Wainwright*, 375 So. 2d 871 (Fla. Ct. App. 1979), where a life sentence judgment was vacated and a new trial ordered when no transcript was available and the death of the judge and defense counsel prevented reconstructing one.

court reporters with a designation of Registered Professional Reporter and various states require certification.[10] The requirements to become a Registered Professional Reporter ("RPR") are rigorous and continuous. In order to become an RPR, an individual must pass both a written knowledge test and a skills test. *See* NCRA, How Your Continuing Education Program Works 2-3 (n.d.) (lodged with the Clerk).

NCRA RPR certification is lost if thirty continuing education credits are not satisfactorily completed in every three year period. *Id.* RPR Certification may also be lost for disciplinary reasons. Since 1987, violations of the Court Reporter's code of ethics have been reviewed by NCRA and actions taken. The code of ethics covers such areas as conflict of interest, confidentiality, dereliction of duty and fraud. NCRA, Code of Professional Conduct 3 (n.d.) (lodged with the Clerk).

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[10] Various courts require that official court reporters serving in their courts have state certification or RPR certification or be in the process of obtaining registration. *See, e.g.*, 28 U.S.C. § 753(g); *see also*, Letter from Bruce Rifkin, Clerk, U.S. District Court, Western District of Washington, to Randall M. Johnson (Aug. 12, 1987), Joint Appendix at 19. NCRA supports this requirement and urges court administrators to institute strict standards for the performance of court reporters. Both the judicial system and the court reporting profession will benefit from the best possible performance standards, just as the judicial system benefits from the best possible performance by judges, counsel, witnesses and jurors. *See* NCRA, A Case for State Certification of Shorthand Reporters (July 1992) (lodged with the Clerk). Unfortunate facts like those of the instant case, where a court hired a noncertified reporter who failed to produce a timely transcript even with the use of her notes and audio recording, might be addressed most effectively in the future by courts simply refusing to make such hiring decisions.

C. It Is Critically Important to the Judicial Process to Preclude Vexatious Suits Against Court Reporters and the Collateral Attacks Such Suits Provide.

The avoidance of vexatious suits and collateral attacks on the judicial process is the third primary policy consideration for the granting of absolute immunity. *See Butz*, 438 U.S. at 512. The threat of a volume of vexatious suits against court reporters would seriously hamper the conduct of the judicial process. Not only would the volume of cases clog the courts and remove court reporters from the courtroom and their regular duties (as well as judges and other critical court personnel needed as witnesses), but it would open an avenue for collateral attack on the underlying judgment. As Judge Posner stated in *Scruggs v. Moellering*, holding that absolute quasi-judicial immunity was appropriate for a court reporter, "[t]he danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts—alleging as here a conspiracy between the adjunct and the judge—warrants this extension of the doctrine." 870 F.2d at 377.

Petitioner suggests that the use of qualified immunity rather than absolute immunity and the availability of summary judgment will eliminate the problems of vexatious suits and collateral attacks. (Petitioner's Br. at 29.) However, a closer analysis of decisions involving qualified immunity demonstrates that this is not so.

One problem is that there is no uniform standard for qualified quasi-judicial immunity. This Court has attempted to narrow the qualified immunity standard for acts by executive branch officials by stating that executive officials are shielded from civil liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. A district court within the Eighth Circuit, however, without

mentioning a standard of conscious disregard of the rights of others, has stated that qualified immunity for court reporters is available for an act the reporter was "specifically required to do under court order or at a judge's direction." *Formanek v. Arment*, 737 F. Supp. 72, 73 (E.D. Mo. 1990).

The Court of Appeals for the Fifth Circuit, in contrast, has afforded qualified immunity to court reporters only if their acts are pursuant to lawful authority and also in "good faith." *Rheuark v. Shaw*, 628 F.2d 297, 305 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981). Good faith, however, is evidently not a part of the qualified immunity standard for court reporters in the Second Circuit. A district court in that circuit was faced with an allegation that a court reporter had made a bad faith alteration to the transcript. The court stated that qualified immunity was available, because the court reporter was acting at the judge's direction, but actually based its decision on derivative absolute immunity. The judge was alleged to have directed the alteration, and the court stated that since the judge was immune from liability then the reporter was also immune. *Neville v. Dearie*, 745 F. Supp. 99, 105 (N.D.N.Y. 1990). This lack of uniformity in the qualified immunity standard for the court reporters makes the use of summary judgment as a means of eliminating suits against them almost useless.

The second problem with qualified immunity for court reporters is that in most jurisdictions it is generally both fact-based and intent-related. As Justice Field said in justifying absolute immunity for judges, "[f]ew persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action." *Bradley*, 80 U.S. (13 Wall.) at 348. Such allegations will be disputed by the respondent and summary judgment will not be useful. In *Briscoe*, the Court observed that lawsuits against witnesses in criminal trials would generally turn on the defendant's state of mind and "[s]ummary judgment is usually not feasible under these circumstances. If summary judgment is denied, the case must proceed to trial and must traverse much of the same ground as the original criminal trial." 460 U.S. at 343 n.4 (citation omitted).

Yet another problem with qualified immunity is that it offers litigants a tempting opportunity to make collateral attacks on judgments.[11] Collateral attacks would defeat the policy of finality and undermine the appellate system. *See Bradley*, 80 U.S. (13 Wall.) at 349. "The loser in one forum will frequently seek another, charging participants in the first with unconstitutional animus." *Butz*, 438 U.S. at 512. Since summary judgment will not be useful in such circumstances, a hearing will be required. An attack on the accuracy of the transcript, for instance, may very well require the presence of the judge, jurors, counsel and witnesses from the first trial in a virtual recreation of the first proceeding. A finding that the transcript was inaccurate could even lead to a new trial. The policy in favor of finality of cases would then be defeated.[12]

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[11] An interesting question is whether the designation of the court reporter's function as administrative would then open a new avenue of attack against judges whose acts of supervising such administrative personnel would also be considered administrative not judicial. At the very least, the increased expense to the court reporter of obtaining liability insurance would be a cost undoubtedly passed on in increased court costs.

[12] Justice Field's fear of the never ending process of judges judging judges is echoed by visions of challenges to court reporters reporting cases challenging court reporters, *ad infinitum*. See *Bradley*, 80 U.S. (13 Wall.) at 349.

CONCLUSION

Absolute immunity is sparingly granted (*Imbler*, 424 U.S. at 427), but in cases where a judicial act was not outside the scope of authority, no matter how injurious the consequences, the importance of the doctrine demands its application. *Bradley*, 80 U.S. (13 Wall.) at 347. There has been no suggestion in the instant case that the actions of the court reporter were outside the scope of her authority. The function being performed by the court reporter, the recording and transcription of the record of a criminal trial, was an integral part of the judicial process and not an administrative act. The policies supporting judicial immunity support absolute quasi-judicial immunity for the function of court reporting. Accordingly, for the reasons stated above, NCRA respectfully requests that the Court affirm the decision of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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